No. 06-457

Title:	G. Steven Rowe, Attorney General of Maine, Petitioner v. New Hampshire Motor Transport Association, et al.
Docketed:	October 2, 2006
Lower Ct:	United States Court of Appeals for the First Circuit
Case Nos.:	(05-2136)
Decision Date:	May 19, 2006

Questions Presented

~~Date~~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~
Aug 16 2006	Motion (06M20) of petitioner for leave to file a petition for a writ of certiorari under seal with redacted copies for the public record filed.
Aug 16 2006	Petition for a writ of certiorari filed. (Response due November 1, 2006)
Aug 23 2006	MOTION (06M20) DISTRIBUTED for Conference of September 25, 2006.
Oct 2 2006	Motion (06M20) of petitioner for leave to file a petition for a writ of certiorari under seal with redacted copies for the public record Granted.
Oct 12 2006	Waiver of right of respondents New Hampshire Motor Transport Association, et al. to respond filed.
Oct 18 2006	DISTRIBUTED for Conference of November 3, 2006.
Oct 25 2006	Brief amici curiae of Tobacco Control Legal Consortium, et al. filed. (Distributed)
Oct 25 2006	Brief amici curiae of California and 35 Other States filed.
Oct 30 2006	Response Requested . (Due November 29, 2006)
Nov 29 2006	Brief of respondents New Hampshire Motor Transport Association, et al. in opposition filed.
Dec 11 2006	Reply brief of G. Steven Rowe, Attorney General of Maine filed. (Distributed)
Dec 13 2006	DISTRIBUTED for Conference of January 5, 2007.
Jan 8 2007	The Solicitor General is invited to file a brief in this case expressing the views of the United States.
May 25 2007	Brief amicus curiae of United States filed.
Jun 1 2007	Supplemental brief of petitioner G. Steven Rowe, Attorney General of Maine filed. (Distributed)
Jun 5 2007	DISTRIBUTED for Conference of June 21, 2007.
Jun 25 2007	Petition GRANTED.
Jul 5 2007	The time to file the joint appendix and petitioner's brief on the merits is extended to and including August 23, 2007.
Aug 22 2007	Brief amici curiae of Tobacco Control Legal Consortium, et al. filed.
Aug 23 2007	Joint appendix filed. (Statement of costs filed)
Aug 23 2007	Brief of petitioner G. Steven Rowe, Attorney General of Maine filed.
Aug 23 2007	Brief amicus curiae of Wine and Spirits Wholesalers of America, Inc. in support of neither party filed.
Aug 23 2007	Brief amici curiae of National Conference of State Legislatures, et al. filed.
Aug 23 2007	Brief amici curiae of California, et al. filed.
Aug 30 2007	The time within which to file respondents' brief on the merits is extended to and including

	October 11, 2007.
Oct 11 2007	Brief amicus curiae of United States filed.
Oct 11 2007	Brief amici curiae of Federal Express Corporation, et al. filed.
Oct 11 2007	Brief of respondents New Hampshire Motor Transport Association, et al. filed.
Oct 11 2007	Brief amici curiae of American Trucking Association, and Chamber of Commerce of the United States of America filed.
Oct 15 2007	SET FOR ARGUMENT Wednesday, November 28, 2007.
Oct 23 2007	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
Oct 23 2007	Record received from U.S.Court of Appeals for the First Circuit. (1 Box) (This record contains sealed documents.)
Oct 25 2007	Record received from U.S.D.C. for the District of Maine. (2 boxes) (This record contains sealed documents)
Nov 2 2007	CIRCULATED.
Nov 9 2007	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
Nov 13 2007	Reply of petitioner G. Steven Rowe, Attorney General of Maine filed. (Distributed)
Nov 28 2007	Argued. For petitioner: Paul Stern, Deputy Attorney General, Augusta, Me. For respondents: Beth S. Brinkmann, Washington, D.C.; and Douglas Hallward-Driemeier, Assistant to the Solicitor General, Department of Justice, Washington, D.C. (for United States, as amicus curiae.)

Supreme Court, U.S.
FILED
AUG 16 2006
OFFICE OF THE CLERK

No. 06-457

In The
Supreme Court of the United States

G. STEVEN ROWE, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF THE STATE OF MAINE,

Petitioner,

v.

NEW HAMPSHIRE MOTOR TRANSPORT ASSOCIATION, MASSACHUSETTS MOTOR TRANSPORTATION ASSOCIATION, INC., and VERMONT TRUCK & BUS ASSOCIATION, INC.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

PETITION FOR A WRIT OF CERTIORARI

REDACTED

G. STEVEN ROWE
Attorney General
PAUL STERN
Deputy Attorney General
(*Counsel of Record*)
MELISSA REYNOLDS O'DEA
PETER B. LAFOND
CHRISTOPHER C. TAUB
Assistant Attorneys General
Office of the Attorney General
6 State House Station
Augusta, ME 04333-0006
Tel: (207) 626-8568

Counsel for Petitioner

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. Whether the Federal Aviation Administration Authorization Act of 1994 ("FAAAA"), 49 U.S.C. §§ 14501(c)(1) and 41713(b)(4)(A), preempts states from exercising their historic public health police powers to regulate carriers that deliver contraband such as tobacco and other dangerous substances to children.

2. Whether the FAAAA preempts states from exercising their historic public health police powers to require shippers of contraband such as tobacco and other dangerous substances to utilize a carrier that provides age verification and signature services to ensure that such substances are not delivered to children.

PARTIES TO THE PROCEEDING

Petitioner G. Steven Rowe is the Attorney General of the State of Maine, acting in his official capacity. Respondents New Hampshire Motor Transport Association, Massachusetts Motor Transportation Association, Inc., and Vermont Truck and Bus Association, Inc., (the "Associations"), are trade associations of businesses engaged in the commercial delivery of packages containing property.

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PETITION FOR A WRIT OF CERTIORARI

The petitioner respectfully petitions for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the First Circuit in this case decided on May 19, 2006.

OPINIONS BELOW

The opinion of the court of appeals is reported at 448 F.3d 66 (Petition Appendix ("App.") 1). The district court's opinions are reported at 377 F. Supp. 2d 197, 324 F. Supp. 2d 231, and 301 F. Supp. 2d 38 (App. 31, 73, and 86).

JURISDICTION

The district court exercised jurisdiction under 28 U.S.C. § 1331, and entered a final amended judgment on June 29, 2005. The court of appeals asserted jurisdiction pursuant to 28 U.S.C. § 1291, and entered judgment on May 19, 2006. The district court entered its second amended judgment on June 29, 2006.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

At issue in this case is whether Maine's "Act To Regulate the Delivery and Sales of Tobacco Products and To Prevent the Sale of Tobacco Products to Minors" ("Maine Act"), which regulates retailers and deliverers of tobacco products in order to protect children, is preempted by the Federal Aviation Administration Authorization Act

of 1994 ("FAAAA"), Pub. L. No. 103-305, § 601, 108 Stat. 1569, 1605. Article VI, clause 2 of the Constitution provides that the laws of the United States "shall be the supreme Law of the Land; . . . any Thing in the Constitution or Laws of any state to the Contrary notwithstanding."

The first FAAAA preemption provision states:

> (A) General rule. – Except as provided in subparagraph (B), a State, political subdivision of a State, or political authority of 2 or more States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier or carrier affiliated with a direct air carrier through common controlling ownership when such carrier is transporting property by aircraft or by motor vehicle (whether or not such property has had or will have a prior or subsequent air movement).

49 U.S.C. § 41713(b)(4)(A). Subparagraph (B), captioned "Matters not covered," provides that subparagraph (A)

> (i) shall not restrict the safety regulatory authority of a State with respect to motor vehicles, the authority of a State to impose highway route controls or limitations based on the size or weight of the motor vehicle or the hazardous nature of the cargo, or the authority of a State to regulate motor carriers with regard to minimum amounts of financial responsibility relating to insurance requirements and self-insurance authorization; and
>
> (ii) does not apply to the transportation of household goods. . . .

49 U.S.C. § 41713(b)(4)(B).

The second preemption provision states:

> (c) Motor carriers of property. (1) General Rule. Except as provided in paragraphs (2) and (3), a State, political subdivision of a State, or political authority of 2 or more States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of any motor carrier . . . with respect to the transportation of property.

49 U.S.C. § 14501(c)(1). Paragraph (2), captioned "Matters not covered," exempts from preemption the same areas set forth above for air carriers, and also certain types of towing rates. 49 U.S.C. § 14501(c)(2). Paragraph (3), captioned "State standard transportation practices," exempts from preemption state regulation related to certain uniform liability rules, bills of lading, and credit rules and certain antitrust laws if such regulation "is no more burdensome than compliance with" federal law, and the carrier requests that the law apply to it. 49 U.S.C. § 14501(c)(3).

The pertinent provisions of the Maine Law, in particular 22 Me. Rev. Stat. Ann. §§ 1555-C(3)(C) and 1555-D, are reproduced at App. 100, and immediately discussed below.

STATEMENT

This case presents the issue of whether Congress has preempted the states from controlling the delivery of dangerous substances, here tobacco, where a carrier such as United Parcel Service ("UPS") is used as the conduit for illegal transactions.

1. The Maine Tobacco Delivery Law. The Maine law at issue here is strongly rooted in the State's traditional police powers to protect the health of its children. Maine, like other states, has historically regulated the transport and delivery of various substances in order to protect the public. These laws range from limiting the sale and delivery of fireworks and explosives, to prohibiting the delivery of liquor, drugs and handguns to minors, to regulating the transportation of plants and wild animals.[1]

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[1] *See, e.g.*, 28-A Me. Rev. Stat. Ann. §§ 2073, 2077, originally enacted in 1987, Me. Pub. L. 1987, c. 45, § A, 4 (liquor transportation provisions); former 12 Me. Rev. Stat. Ann. § 7534, originally enacted in 1979, Me. Pub. L. 1979, c. 420, § 1 ("Any common carrier accepting any wild animal or wild bird for transportation shall" check the hunter's license, affix tags and identification, and make returns to the commissioner); 8 Me. Rev. Stat. Ann. §§ 221, *et seq.*, enacted by Me. Pub. L. 1985, c. 23, § 2 (prohibiting possession, sale or transport "in any conveyance" of fireworks "except as permitted by" state regulations); 17-A Me. Rev. Stat. Ann. § 1001(1)(B), enacted by Me. Pub. L. 1975, c. 499, § 1 (prohibiting transport or sale of explosives without a permit); 28-A Me. Rev. Stat. Ann. § 2081, enacted by Me. Pub. L. 1987, c. 45, § A, 4 (prohibiting furnishing, delivering, or giving liquor to a minor); 7 Me. Rev. Stat. Ann. § 3981, enacted by Me. Pub. L. 1987, c. 383, § 3 (regulating periods of confinement and conditions for transportation of animals); 12 Me. Rev. Stat. Ann. §§ 8305-06, originally enacted by Me. Pub. L. 1979, c. 545, § 3 (prohibiting and regulating shipment of plants and trees); 17-A Me. Rev. Stat. Ann. § 1118 (transporting scheduled drugs); 17-A Me. Rev. Stat. Ann. § 554-B(2) (transferring handgun to minor).

It is illegal in Maine for a minor to "purchase, possess or use cigarettes, cigarette paper or any other tobacco product." 22 Me. Rev. Stat. Ann. § 1555-B(5-A). A person "may not sell, furnish, give away or offer to sell, furnish or give away a tobacco product to any person under 18 years of age" and may not sell "to any person under 27 years of age unless the seller first verifies that person's age by means of reliable photographic identification containing the person's date of birth." *Id.* at § 1555-B(1) & (2).

Internet and telephone sales of tobacco products have become a serious problem. By means of delivery services, enterprising retailers seek to avoid over-the-counter age verification requirements by selling the tobacco products to minors and delivering them not over-the-counter, but rather through third-party carriers such as UPS. In response to this dangerous practice, in 2003 the Maine Legislature passed "An Act To Regulate the Delivery and Sales of Tobacco Products and To Prevent the Sale of Tobacco Products to Minors," Me. Pub. L. 2003, c. 444.

The Act requires a person who engages in the sale of tobacco products by means of delivery to take a number of steps to ensure that tobacco products do not reach the hands of minors. Retailers engaged in delivery sales of tobacco to Maine citizens must obtain a retail license from the Maine Department of Human Services (22 Me. Rev. Stat. Ann. § 1555-C(1)), just as over-the-counter retailers must (*Id.* at § 1551-A). Similarly, the Act requires the internet or telephone tobacco retailer to obtain age verification (*Id.* at § 1555-C(2)), just as age verification for persons under 27 years of age is called for in over-the-counter sales (*Id.* at § 1555-B(2)).

The Act requires the retailer to "clearly mark the outside of the package . . . to indicate that the contents are tobacco products and to show the name and State of Maine tobacco license number of the . . . retailer." *Id.* at § 1555-C(3)(B).[2] Section 1555-C(3)(C) applies only to retailers who ship tobacco products, not to the carriers, and calls for tobacco retailers to "utilize a delivery service that imposes" requirements that the addressee be of legal age to purchase tobacco products and sign for the package, the purchaser be the addressee, and, if the addressee is under 27 years old, present a valid identification showing proof of age.[3] Tobacco products shipped in violation of these requirements are contraband, subject to forfeiture. *Id.* at 1555-C(7).

Section 1555-D of the Act applies to carriers and, in pertinent part, provides:

> A person may not knowingly transport or cause to be delivered to a person in this State a tobacco product purchased from a person who is not licensed as a tobacco retailer in this State, except that this provision does not apply to the transportation or delivery of tobacco products to a licensed tobacco distributor or tobacco retailer. A person is deemed to know that a package contains a tobacco product if the package is marked in accordance with the requirements of section 1555-C, subsection 3, paragraph B or if the person

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[2] Maine adopted rules for the enforcement of this law that require, *inter alia*, the retailer to mark the label side of the package with a tobacco marking, and does not require a carrier to look at the bottom of a package for tobacco markings. 10-144 -203 Me. Code. R. §§ 10(C)(2), 11.

[3] Section 1555-C(3)(A) requires the tobacco retailer, prior to shipping, to provide to the delivery service the age of the purchaser.

> receives the package from a person listed as an unlicensed tobacco retailer by the Attorney General under this section.

Transgressions are civil violations punishable by fines of from $50 to $1500, and the Attorney General may enforce the law by seeking injunctive relief. *Id.* at § 1555-D(2) & (3). Maine maintains a list of licensed and known unlicensed retailers, provides the list to delivery services, and reliance on that list is an affirmative defense. *Id.* at § 1555-D(3) & (4). These provisions ensure that a carrier is not delivering contraband tobacco.

2. The Federal Aviation Administration Authorization Act of 1994. The FAAAA was intended to preempt the states from engaging in economic regulation in order (1) to eliminate non-uniform "[s]tate economic regulation of motor carrier operations [that] causes significant inefficiencies, increased costs, reduction of competition, inhibition of innovation and technology, and curtails the expansion of markets"; and (2) to "level the playing field" between air carriers and motor carriers. H.R. Conf. Rep. No. 103-677, at 85-88 (1994), *reprinted in* 1994 U.S.C.C.A.N. 1715, 1758-60. "The problem to which the congressional conferees attended was 'state *economic* regulation.'" *City of Columbus v. Ours Garage and Wrecking Service, Inc.*, 536 U.S. 424, 440 (2002) (emphasis in original). There is no hint that Congress intended to preempt state public health laws regulating the delivery of dangerous substances.

The pertinent preemption provisions were enacted as Pub. L. No. 103-305, § 601, 108 Stat. 1569, 1605. Congress found that state regulation of intrastate transportation of property imposed unreasonable burdens on and impeded the free flow of interstate commerce and placed an unreasonable

cost on American consumers, and, therefore, "*certain aspects* of the State regulatory process should be pre-empted." Pub. L. No. 103-305, § 601(a)(1) & (2) (emphasis added).

Section 41713(b) of Title 49 was amended to add a "[g]eneral rule" that "[e]xcept as provided in subparagraph (B)," a state could not enact or enforce a law "related to a price, route, or service of an air carrier . . . when such carrier is transporting property by aircraft or by motor vehicle." Pub. L. No. 103-305, § 601(b)(1), codified at 49 U.S.C. § 41713(b)(4)(A). Subparagraph (B), entitled "Matters not covered," provided that preemption would not cover state regulation of safety, hazardous cargo, insurance or household goods. Pub. L. No. 103-305, § 601(b)(1), codified at 49 U.S.C. § 41713(b)(4)(B).

In order to accomplish the goal of placing air and ground carriers on the same economic plane, as part of the FAAAA Congress enacted a new subsection entitled "Preemption of State *Economic* Regulation of Motor Carriers." Pub. L. No. 103-305, § 601(c) (emphasis added). This new subsection proscribed states from enacting or enforcing laws "related to a price, route, or service of any motor carrier . . . with respect to the transportation of property." Pub. L. No. 103-305, § 601(c), originally codified at 49 U.S.C. § 11501(h)(1), now codified at 49 U.S.C. § 14501(c)(1). The exemptions from preemption for motor carriers included the same matters exempted for air carriers – state regulation of safety, hazardous cargo, insurance or household goods. Pub.

L. No. 103-305, § 601(c), originally codified at 49 U.S.C. § 11501(h)(2), now codified at 49 U.S.C. § 14501(c)(2).[4]

The exceptions came about due to Congress' paying specific attention to the American Trucking Association's position that there be no preemption of state "non-economic factors," and the conferees intended to implement that approach. H.R. Conf. Rep. No. 103-677, at 88 (1994), *reprinted in* 1994 U.S.C.C.A.N. 1715, 1760; *City of Columbus,* 536 U.S. at 440-41. In particular, the conferees added the specific exceptions to preemption in an effort to make clear that the intent was "to preempt *economic* regulation by the States"; and the conferees explained that those specific exceptions "were not intended to be all inclusive, but merely to specify some of the matters which are not 'prices, rates or services' and which are therefore not preempted." H.R. Conf. Rep. No. 103-677, at 84, 86-88 (1994), *reprinted in* 1994 U.S.C.C.A.N. 1715, 1756, 1758-60 (emphasis added). Non-uniform regulation in non-preempted areas was expected and permitted. *City of Columbus,* 536 U.S. at 441.

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[4] Congress also included an additional exemption from preemption for motor carriers for certain "State standard transportation practices" regarding uniform liability, bills of lading, credit rules and antitrust laws if the carrier requests that the state law apply to it. Pub. L. No. 103-305, § 601(c), originally codified at 49 U.S.C. § 11501(h)(3), now codified at 49 U.S.C. § 14501(c)(3).

Just one year after its enactment, § 11501(h) was recodified at 49 U.S.C. § 14501(c), with an added exemption for state regulation of nonconsensual tow rates – by the Interstate Commerce Commission Termination Act of 1995 (ICC Termination Act), Pub. L. No. 104-88, § 103, 109 Stat. 803, 899. The tow rate exemption is now found at section 14501(c)(2)(C).

3. Operative Facts. The three respondents-plaintiffs are non-profit trade associations whose members are "engaged in the commercial delivery of packages containing property." In their challenge to the Maine Act, the Associations relied entirely upon the experience and facts of UPS.

Ordinarily, and prior to the enactment of this law, all sides of the exterior of packages are visually scanned at many stages through the distribution process[5] for, *inter alia,* labels, signs of damage, improper packaging, leakage, handguns, prohibited contents and hazardous waste markings by various UPS employees such as sorters, presorters and drivers. UPS has implemented written procedures and policies relating to the delivery of substances such as alcohol and handguns.

In response to the Maine Act, UPS instructed certain of its employees in Maine to look for markings indicating

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[5] UPS uses a "hub-and-spoke" system, which consists of an extensive network of sorting facilities throughout the country that generally works as follows: the person or entity shipping the package provides delivery information on UPS's shipping form or though an electronic shipping system; the package enters UPS's system through a package driver pick-up (including pickups from the shipper, an outlet such as a UPS Store or a UPS drop box), or through UPS's customer counter; the driver brings the picked-up package to a local operating center; the package is unloaded and placed on conveyor belts for sorters to separate based on delivery location and the delivery time commitment; feeder vehicles and, in some cases, airplanes and trains take the package from the centralized hub to another hub for further sorting, and ultimately to a local center for delivery; at the local center the package is further sorted and loaded onto a vehicle for delivery based on the recipient's address; and at delivery the driver physically delivers the package checking specific delivery information, such as the need for age verification or a signature, on a hand-held computer device (a "DIAD").

that a package contained tobacco products. The preloaders and drivers were instructed to treat any such package as non-deliverable, and to give that package to a designated employee who assesses how to proceed, including returning the package to the sender or disposing of the package.

A UPS employee estimated that it takes a preloader approximately an additional two seconds to visually scan the label of a package for tobacco indicia. Based upon this estimate, the UPS employee provided a cost figure for Maine, amounting to approximately $0.009, or less than one cent, per package. UPS did no other study or analysis to determine whether a driver spends any additional time to comply with the Maine Act, or what the effect of the Maine Act is on its package sorting rate. UPS delivers approximately 65,000 packages per day in Maine.

During a five-month period, UPS intercepted a total of thirty-three packages that its workers believed contained tobacco products destined for Maine consumers. UPS estimates that it costs approximately $2.00 in personnel time to deal with each such package. Thus, according to UPS, for a five month period there was an additional $66 in costs to UPS to comply with Maine's law. UPS's total revenue in 2003 was $33.5 billion.

UPS's computer systems, according to UPS, can do "pretty much anything." It is the second largest computer system in the world. At the time of each and every delivery, the UPS driver checks and enters delivery information on a hand-held computer device ("DIAD"). The DIAD has the capability and does provide relevant prompts or "alerts" regarding each package when delivered. These "alerts" inform the driver, *inter alia,* whether a signature or adult confirmation is required. UPS has the capability

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to flag specific delivery addresses or specific consignees to generate an alert, [redacted] UPS offers a delivery confirmation, adult signature-required service, for an additional fee of either $1.75 or $2.75. When a driver delivers such a package, she receives a prompt on her DIAD to have her verify the age of the person receiving the package or obtain a signature. [redacted]

The State provided to UPS an electronic version of its list of known unlicensed tobacco retailers who may be attempting to unlawfully ship tobacco to Maine consumers, but UPS has not researched whether any of its regular shippers are on the state list of known unlicensed tobacco retailers. UPS has over 4,000 employees in the technology and information systems area but did no study of the capability of the system regarding compliance with the Maine law.

During the pendency of the appeal, UPS entered into an agreement to comply with New York's "Unlawful Shipment of Cigarettes Law," N.Y. Pub. Health Law, § 1399-*ll*. UPS agreed, *inter alia*, to impose measures to ensure that employees "actively" look for indications that a package contains cigarettes, and to instruct preloaders and drivers not to load for delivery or deliver cigarette packages to consumers. UPS's policy is to "require its shippers to be licensed by applicable law in order to ship tobacco products," and to accept shipments of cigarettes for delivery only to recipients who are licensed by applicable federal or state law to receive cigarette deliveries.

4. Proceedings Below. On October 10, 2003, the Associations commenced this action in the United States

District Court for the District of Maine to challenge sections 1555-C(3)(A) and (C) and 1555-D of the Maine Act as preempted facially and as-applied by the FAAAA. The Associations immediately filed a motion for summary judgment that those provisions were facially preempted. On February 6, 2004, the district court denied plaintiffs' motion, holding the challenged portions of the Maine Act were not facially preempted by the FAAAA. (App. 86). The court allowed the Associations to proceed on the as-applied challenge.

The Attorney General then filed a motion for summary judgment on the facial challenge for the reasons set forth in the court's first decision. On June 30, 2004, the district court granted summary judgment for the Attorney General on "all counts as to any facial FAAAA preemption challenges to" the Maine Act. (App. 73).

Cross-motions for summary judgment were filed, and, on May 27, 2005, the district court issued its ruling in favor of the Associations and against the Attorney General that sections 1555-C(3)(C) and 1555-D were preempted by the FAAAA both facially, thus reversing its prior rulings, and as applied. (App. 31).

The Attorney General appealed. On May 19, 2006, the First Circuit issued its decision effectively affirming the lower court's decision.[6] (App. 1). The First Circuit held that

[6] Below, the Attorney General sought dismissal of the action on the grounds of mootness and lack of associational standing. The appeals court rejected those positions (App. 7-12). In particular, the First Circuit reasoned the matter was not moot because the New York agreement dealt only with cigarettes, while Maine's law covers all tobacco products. The Attorney General no longer presses these arguments.

the FAAAA "preempts state police-power enactments" to the extent they have "the effect of forcing [a carrier] to change its uniform package-processing procedures," and the purpose of the state law is irrelevant to the preemption inquiry. (App. 17-18, 28). The court reasoned that the "related to" language of the FAAAA's preemption provisions as well as the FAAAA's structure and legislative history support a broad preemptive effect, and that the Attorney General's view would "swallow the rule of preemption" because most state laws are enacted pursuant to the states' police powers. (App. 14-21). The appeals court also found that the conferees' specific reference to *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374 (1992), required adherence to a broad view of preemption, and the court refused to apply subsequent Supreme Court interpretation of similar "relate to" preemption language in ERISA, indicating it was for the Supreme Court and not the First Circuit to do so. (App. 14-16, 20).

The appeals court found that section 1555-C(3)(C) – which requires tobacco retailers to use a delivery service that provides delivery directly to the purchaser, a signature, and age verification – is "related to" a carrier's service due to the potential for delay if a carrier chose to provide such options. (App. 23). Although the provision applies only to retailers, the court reasoned it indirectly regulated carriers by "employing [the state's] coercive powers to police the method by which carriers provide services in the state." (App. 24).

Section 1555-D precludes carriers from *knowingly* delivering tobacco products to children. The First Circuit found that so much of section 1555-D that proscribed "knowing" delivery of tobacco for an unlicensed retailer was not preempted. (App. 26). However, the appeals court

went on to conclude that section 1555-D was preempted to the extent it charged carriers with knowledge that a package contains tobacco products if the package is so marked or if the shipper appears on the Attorney General's list of licensed or known unlicensed retailers. (*Id.* at 27-28). These provisions were found to be preempted because they require the carrier "to change its uniform package-processing procedures" by inspecting every package destined for delivery in Maine and segregating the packages that contain tobacco to research whether the addressee is a Maine-licensed retailer or distributor who can receive the package. (*Id.*) The First Circuit conceded there was "potential tension" in its decision – Maine hypothetically could prosecute a carrier for "knowing delivery" of contraband tobacco, but Maine could not impute knowledge "based on a failure to read labels or consult lists – an imputation which would amount to prescribing how carriers must operate." (*Id.* at 28-29). Of course, these are the identified means to prove "knowing" delivery of tobacco. The court admitted that "as a practical matter, [it] may be difficult to prove" a case against a carrier. (*Id.* at 29).

REASONS FOR GRANTING WRIT

The First Circuit's decision has far-reaching and devastating effects on the states' ability to exercise their historic health-related police powers. The First Circuit held that the FAAAA preempts the exercise of the state's historic public health police powers whenever the state regulation directly or indirectly potentially affects a carrier's business. The decision forbids states from requiring retailers to use a carrier that provides age verification

and signature services, even though some carriers already provide these types of services. And the decision forbids states from imputing knowledge to a carrier from obvious tobacco markings on a package because it has "effects" on the "uniformity" of a carrier's procedures, even though the carriers already check the packages for a variety of other markings and for damage. These are the means to regulate delivery of dangerous substances, and the First Circuit has identified no others. The decision, thus, preempts countless state laws that have existed for decades, regulating the sale and delivery of substances, from tobacco to weapons to alcohol. *See* note 1, *supra.*

It is beyond debate that unregulated access by children to tobacco products is a serious public health problem – tobacco addicts, sickens and kills. Regulation of children's access to tobacco traditionally and specifically is intended by Congress to be handled by the states. There is *no* federal program regulating delivery sales of tobacco by telephone and internet retailers. The appeals court decision effectively leaves delivery sales of tobacco to children unregulated by any government, a result nowhere suggested by Congress or supported by common sense.

The First Circuit's decision is wrong and conflicts with decisions of this Court. The FAAAA was intended to preempt state *economic* regulation, *City of Columbus,* 536 U.S. at 432. There is no hint that Congress intended preemption of state public health regulations that may have an effect on the "uniformity," and potentially the "economics" or profitability, of carriers. The First Circuit's boundless reading of the "related to" language in the FAAAA preemption provisions swallows up state police powers, and the appeals court specifically refused to follow this Court's practical interpretation of similar language

found in other statutes such as ERISA. It should come as no surprise, therefore, that the First Circuit's decision also conflicts with the analysis of FAAAA preemption of other circuits. The Second and Ninth Circuit hold that the FAAAA does not preempt a state's exercise of its traditional police powers in noneconomic areas. This Court should grant certiorari and reverse the First Circuit's damaging decision.

I. THE COURT'S REVIEW IS NEEDED BECAUSE THE FIRST CIRCUIT'S DECISION PREVENTS THE STATES FROM REGULATING DELIVERY SALES OF DANGEROUS SUBSTANCES, INCLUDING IN PARTICULAR TOBACCO TO CHILDREN.

Tobacco is just one of many substances controlled by states to protect the public health and safety. Maine, like virtually all states, places controls and restrictions on the sale and delivery of tobacco as well as, *inter alia*, weapons, chemicals, and live animals.[7] State controls rely almost entirely upon requiring retailers to ship dangerous substances in a certain fashion or checking for identifying markings or labels on the outside of the package. By holding a state cannot require a retailer to ship dangerous substances in a particular fashion, such as requiring age verification, or impute knowledge to a carrier it is shipping

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[7] *E.g.*, Ala. Code § 2-14-5 (barring transport of certain products related to bee keeping); Ariz. Rev. Stat. § 3-209 (barring the transport of quarantined produce); Ariz. Rev. Stat. § 13-3102 (barring transport of prohibited weapons); Cal. Bus. & Prof. Code § 17533.9 (barring transport of teargas); Cal. Fish & Game Code § 4800 (barring the transport of mountain lions); N.Y. Penal Law § 190.50 (barring transport of slot machines or other gambling devices). *See also* note 1, *supra*.

such substances from markings or labels, the First Circuit effectively prevents the states from controlling these substances. There is no other manner to effectively regulate delivery sales of dangerous substances to children. Certainly, the First Circuit does not identify any. The appeals court's decision prevents states from controlling the third-party delivery of such substances, a result having grave consequences for the public health and nowhere suggested by Congress.

"[T]obacco use, particularly among children and adolescents, poses perhaps the single most significant threat to public health in the United States." *Federal Drug Administration v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 161 (2000). Although there is *no* comprehensive federal tobacco delivery law, every state bans the sale of tobacco to children. Moreover, as this Court recognized in *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 552 (2001), "there is an established congressional policy that supports" state laws prohibiting cigarette sales to minors; "Congress has required States to prohibit tobacco sales to minors as a condition of receiving federal block grant funding for substance abuse treatment activities." The *Lorillard* Court pointed to the 1992 Synar Amendment, Pub. L. No. 102-321, Title II, § 202, 106 Stat. 394, which conditions the receipt of federal block grant funding for substance abuse treatment activities on states' enactment and effective enforcement of laws covering the *sale* and *distribution* of tobacco by "any manufacturer, retailer, or distributor." The Synar Amendment specifically mandates that the states "reduce the extent to which tobacco products are available to individuals under the age of 18." 42 U.S.C. § 300x-26(a)(1) & (b)(1). While striking down certain aspects of the Federal Cigarette Labeling and Advertising Act, 15

U.S.C. § 1334(b), the Court approved of state laws that regulate the "sale and distribution of tobacco products" to children, and emphasized that "States and localities also have at their disposal other means of regulating conduct to ensure that minors do not obtain cigarettes." 533 U.S. at 552.

"The presumption against federal pre-emption of a state statute designed to foster public health, has special force when it appears . . . that the two governments are pursuing 'common purposes.'" *See Pharmaceutical Research & Mfrs. of Am. v. Walsh,* 538 U.S. 644, 666 (2003) (citations omitted). There is no doubt that the federal and state governments have a common purpose in dealing with youth access to tobacco, and that Congress has left and encouraged that regulation to the states.

While the First Circuit stated that the "FAAAA and Synar Amendment can exist harmoniously because the states may pass laws to curb underage smoking without passing laws 'related to' carrier prices, routes, or services," even that court recognized the "tension" and "practical" difficulties of its decision. (App. 28-29). By striking down the Maine law requiring telephone and internet retailers to use a carrier that provides age verification and signature services, the decision allows those retailers to avoid age verification requirements otherwise applicable to over-the-counter retailers. And the decision purports to allow states to prevent carriers from *knowingly* delivering tobacco, but prevents the states from imputing knowledge to the carriers from tobacco markings or labels on a package, the only identified means to proving *knowing* delivery. The appeals court's decision is unworkable and allows telephone and internet retailers to circumvent state law by utilizing carriers to deliver contraband to minors.

The First Circuit decision thus draws into question the underpinnings of this Court's recent holding in *Granholm v. Heald,* 544 U.S. 460 (2005). There, the Court struck down certain state laws regulating youth access to alcohol as discriminatory against out-of-state businesses under the Commerce Clause. In doing so, the Court explained that "the States can take less restrictive steps to minimize the risk that minors will order wine by mail. For example, the Model Direct Shipping Bill developed by the National Conference of State Legislatures requires an adult signature on delivery and a label so instructing on each package." *Id.* at 490-91. These requirements are similar to those struck down by the First Circuit. It would be a curious result indeed if the sort of "less restrictive" state public health regulations relied upon in *Granholm* are, in fact, preempted under the FAAAA.

II. THE FIRST CIRCUIT'S PREEMPTION ANALYSIS IS INCORRECT AND NOT CONSISTENT WITH THIS COURT'S DECISIONS.

The First Circuit's decision conflicts with this Court's holdings which give a practical meaning to otherwise boundless "relate to" preemption language. This Court's approach honors the intent of Congress when considering the scope of its preemption of states' police powers. The First Circuit's decision, by contrast, rests upon a broad reading of "related to" that effectively swallows up state contraband delivery laws – even though Congress did not manifest any intent, let alone a clear one, to preempt states' health-related police powers. The First Circuit should have looked directly at the intent of Congress, as identified by this Court, that only state *economic* laws regulating carriers are preempted by the FAAAA. *See City*

of Columbus, 536 U.S. at 441. Congress did not intend to preempt any and all traditional state public health laws that happen to have some effect on the uniformity or economic profitability of carriers.

The FAAAA language that preempts state laws "related to a price, route, or service," 49 U.S.C. §§ 14501(c)(1), 41713(b)(4)(A), on its face is of the same limitless breadth as that found in ERISA that preempts state laws "insofar as they . . . relate to any employee benefit plan," 29 U.S.C. § 1144(a). But the Court has explained in the context of ERISA that the term "relate to" is "unhelpful" and "frustrating," requiring resort to the objectives of the federal legislation. *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 656 (1995). The term "relate to" cannot be taken "to extend to the furthest stretch of its indeterminacy," or else "for all practical purposes pre-emption would never run its course." *Id.* at 655; *see also California Div. of Labor Standards Enforcement v. Dillingham Construction, Inc.*, 519 U.S. 316, 335 (1997) (Scalia, J., concurring) ("as many a curbstone philosopher has observed, everything is related to everything else."). Under such circumstances, the "preemption claims turn on Congress' intent," not the literal application of "relate to." *Travelers,* 514 U.S. at 655. The First Circuit, however, specifically chose not to apply this common sense approach to similar preemption language in the FAAAA, stating quite clearly that it is up to the Supreme Court, and not the First Circuit, to do so. (App. 16). The Court should take the opportunity to do so here.

Just as there is "nothing in the language of [ERISA] or the context of its passage indicat[ing] that Congress chose to displace general health care regulation, which

historically has been a matter of local concern," *Travelers*, 514 U.S. at 661, so too there is nothing in the language or context of the FAAAA's passage suggesting Congress enacted that law to displace state contraband delivery laws. As noted by this Court, the FAAAA was intended to preempt "the State's economic authority . . . , 'not restrict' the preexisting traditional police power over" safety, *City of Columbus*, 536 U.S. at 439, and obviously public health as well. The conferees referred to this Court's decision in *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374 (1992), which dealt with similar "relating to" language in the Airlines Deregulation Act (ADA), 49 U.S.C. § 1305(a)(1), as setting forth the level of preemption, but in subsequent pages the conferees repeatedly explained that preemptive effect related to "economic" regulations. H.R. Conf. Rep. No. 103-677, at 83, 84, 86-88 (1994), *reprinted in* 1994 U.S.C.C.A.N. 1715, 1755, 1756, 1258-60. The report went on to explain that the committee's intent was not to preempt state authority to regulate such areas as safety and hazardous material, which is only a "partially identified," not "all inclusive" list, so long as the state regulation is not a "guise for . . . economic regulation." H.R. Conf. Rep. No. 103-677, at 83, 84 (1994), *reprinted in* 1994 U.S.C.C.A.N. 1715, 1755, 1756. Regulation in such areas "is not a price, route or service and thus is unaffected." H.R. Conf. Rep. No. 103-677, at 85 (1994), *reprinted in* 1994 U.S.C.C.A.N. 1715, 1757. Finally, the conferees noted that several states, including Maine, had none of the problematic laws that were intended to be preempted, H.R. Conf. Rep. No. 103-677, at 86, *reprinted in* 1994 U.S.C.C.A.N. at 1757, 1758. At that time, Maine had numerous contraband delivery laws on the books. *See* note 1, *supra*.

Thus, it is clear that when it used the broad phrase "related to a price, route, or service," Congress did not intend it to be applied literally – and boundlessly – to preempt state public health laws regulating retailers and carriers regarding delivery of dangerous substances such as tobacco. This Court already has approved of state laws regulating the sale and distribution of tobacco to children, *Lorillard*, 533 U.S. at 552, 571, and state laws requiring adult signature and identifying markings for the delivery of alcohol, *Granholm v. Heald*, 544 U.S. at 490. So long as the state law is not intended to regulate the economics of the carriers, such as setting rates or establishing tariffs, there is no preemption under the FAAAA.

Had the First Circuit applied the correct analysis in this case, it would have found that none of the provisions of Maine law at issue were preempted. Section 1555-C(3)(C) requires retailers to use a delivery carrier that provides age verification and signature services in order to prevent delivery of tobacco to children. First, these are not *economic* regulations – they are intended only to protect the health of children – and therefore are not embraced by the FAAAA's "related to" language. Moreover, this provision does not require a carrier to do anything – it merely requires that a *retailer* use a service that is provided by carriers. As noted, the only carrier to present record evidence, UPS, stated that it offers a type of delivery confirmation, adult-signature-required service, for an additional nominal fee of either $1.75 or $2.75. All section 1555-C(3)(C) requires, therefore, is that retailers use a carrier that chooses to provide the required service. It is difficult to see how that regulates the "service" provided by carriers.

The First Circuit's decision appears to be founded on the notion that this regulation of retailers somehow coerces rival carriers to compete to provide such options, and therefore is "related to" a service. (App. 24). Such a boundless reading of a "related to" preemption provision is precisely what this Court rejected in the ERISA line of cases. Its effect, as a practical matter, is to eliminate any state ability to control how retailers deliver tobacco, alcohol and other substances, a result clearly at odds with pronouncements of this Court and the intent of Congress.

The First Circuit's holding regarding section 1555-D fares no better. On the one hand, the court found that the first part of section 1555-D – which prohibits the knowing delivery of tobacco – is not preempted because that could not possibly have been the intent of Congress. (App. 25-27). On the other hand, the court held that the Maine provision imputing knowledge to a carrier from tobacco markings and labels – the only identified means to establish a *knowing* delivery – *is* preempted. (*Id.* at 27-28). The appeals court acknowledged the "tension" in its decision and the "practical" difficulties for the State to prove its case. (*Id.* at 28-29). Simply put, if a State cannot impute knowledge to a carrier from a tobacco marking or label – even though UPS stated that it already checks the outside of packages for other markings, labels and signs of damage – the "practical" difficulties of enforcing Maine's law are in reality insurmountable.

If the First Circuit were true to its reading of "related to," it would have struck down the first part of section 1555-D as well, but even that court realized Congress could not have intended to bar the states from controlling contraband. Instead, the appeals court upheld *in theory* a state's authority to regulate delivery of tobacco, but struck

down the only means to exercise that authority. As that authority rests upon the state's health-related police powers, and not economic regulation, the appeals court decision not only is unworkable but is in direct contravention of this Court's holdings and Congress' intent.

III. THE FIRST CIRCUIT'S DECISION IS INCONSISTENT WITH THE DECISIONS OF OTHER COURTS OF APPEALS AS WELL AS LOWER COURTS.

The First Circuit's view of FAAAA preemption is markedly at odds with that of the Ninth and Second Circuits, as well as several lower courts. In *Californians for Safe & Competitive Dump Truck Transp. v. Mendonca*, 152 F.3d 1184 (9th Cir. 1998), *cert. denied*, 526 U.S. 1060 (1999), the Ninth Circuit concluded that certain California prevailing wage laws, which were alleged to increase prices by 25 percent and to compel rerouting of equipment, were not preempted by the FAAAA. Plaintiffs argued that the FAAAA preempted the state prevailing wage law because it "directly affects, and therefore is 'related to' the prices, routes, and services of" plaintiffs. *Id.* at 1189. The Ninth Circuit found that California's wage laws were "state action in a field long regulated by the states," and do not "fall[] into the 'fields of laws' regulating prices, routes, or services," finding that nowhere in the FAAAA is there any "mention of Congress's intent to occupy the field of general prevailing wage laws." *Id.* at 1189 & n.6. Obviously, the First Circuit takes the opposite view of the FAAAA – although there is no mention of a Congressional intent to preempt state public health laws, the appeals court held that such an intent is presumed from the "related to" language.

In reviewing the legislative history, the Ninth Circuit noted that Congress identified 41 jurisdictions "which regulated intrastate prices, routes and services, followed by ten jurisdictions which did not regulate in those areas." *Id.* at 1187, relying upon H.R. Conf. Rep. 103-677, at 86 (1994), *reprinted in* 1994 U.S.C.C.A.N. at 1758. Seven of the latter ten jurisdictions, including Maine, had prevailing wage laws at the time of FAAAA's enactment. *Id.* at 1187 & n.3. The appeals court found this constitutes "indirect evidence that Congress did not intend to prevent" prevailing wage laws, a "perception reinforced by the absence of any *positive* indication in the legislative history that Congress intended preemption in this area of traditional state power." *Id.* at 1188. Similarly, Maine was identified by the conferees as a state with no problematic laws; although Maine had substance delivery laws on the books when the FAAAA was enacted (*see* note 1, *supra*), the First Circuit ignored this key consideration.

The appeals courts also disagree regarding the interplay between the interpretations of the similar "related to" preemption language of the FAAAA, Airline Deregulation Act ("ADA"), and ERISA. The Ninth Circuit read *Morales* and *American Airlines, Inc. v. Wolens*, 513 U.S. 219, 234-35 (1995), both of which dealt with the ADA, as not establishing a rigid and boundless rule of preemption, and incorporated into its FAAAA analysis this Court's practical approach toward preemption found in subsequent ERISA cases "to preserve the proper and legitimate balance between federal and state authority." *Mendonca*, 152 F.3d at 1188-89. The First Circuit read *Morales* and *Wolens* as requiring courts only to "focus . . . on the *effect* that the state law has on . . . operations," and, as noted previously,

specifically declined to apply this Court's ERISA analysis to the FAAAA. (App. 15-20).

Subsequently, in *Ace Auto Body & Towing, Ltd. v. City of New York,* 171 F.3d 765 (2d Cir. 1999), the Second Circuit dealt with the scope of the FAAAA's tow truck exception to preemption, deciding that certain New York City towing regulations were not preempted by the FAAAA. That appeals court, like the Ninth Circuit, began with the basic proposition that a state's historic police powers are not superseded unless that was the "clear and manifest purpose of Congress." *Id.* at 771. The Second Circuit found that FAAAA preempts *economic* regulation, and applied the "common sense" approach towards preemption from its ERISA cases. *Id.* at 773-74. Again, the First Circuit takes the opposite approach.

Three lower courts have directly found tobacco contraband and delivery laws not to be preempted by the FAAAA. In *New York State Motor Truck Assoc. v. Pataki,* 2004 U.S. Dist. Lexis 25519 (S.D. N.Y. 2004), the court rejected a claim that the FAAAA facially preempted New York's law mandating, *inter alia*, that if the carrier transported cigarettes to a home or residence, the carrier is presumed to know that such person was not a statutorily authorized recipient. In *Ward v. New York,* 291 F. Supp. 2d 188 (W.D. N.Y. 2003), brought by tobacco retailers and manufacturers, the court denied a motion for a temporary restraining order against enforcement of that law, concluding plaintiffs' FAAAA preemption claim was not likely to succeed. The courts concluded that Congress was concerned with "state economic regulation," not public health laws. *Pataki,* 2004 U.S. Dist. Lexis 25519, at *16; *Ward,* 291 F. Supp. 2d at 209-10. The *Pataki* court put it best, holding "there is nothing within the body of the federal

law or in the legislative history suggesting Congress intended to usurp the states' power to regulate the manner in which cigarettes are shipped into their borders in order to protect their citizenry from the pernicious effects of tobacco which negatively impacts on the states' economy." *Pataki*, 2004 U.S. Dist. Lexis 25519, at *21.

Finally, in *Robertson v. State of Washington Liquor Control Board*, 10 P.3d 1079 (Wash. App. Ct. 2000), the court rejected a claim that Washington's law governing the forfeiture of unstamped cigarettes was preempted by the FAAAA. Using reasoning similar to that of the New York district courts, the Washington court upheld the Washington law even though it did have an impact on the use of plaintiff's truck to haul contraband cigarettes, noting that if the FAAAA preempted state laws prohibiting the "service" of transporting contraband, "a motor carrier would be exempt from forfeiture for transporting a methamphetamine lab, poached game, or contraband cigarettes." *Id.* at 858. The First Circuit's decision draws that obvious and correct conclusion into question.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

G. STEVEN ROWE
Attorney General
PAUL STERN
Deputy Attorney General
(*Counsel of Record*)
MELISSA REYNOLDS O'DEA
PETER B. LAFOND
CHRISTOPHER C. TAUB
Assistant Attorneys General
Six State House Station
Augusta, ME 04333-0006
(207) 626-8568

Counsel for Petitioner

NEW HAMPSHIRE MOTOR TRANSPORT ASSOCIATION; MASSACHUSETTS MOTOR TRANSPORTATION ASSOCIATION, INC.; VERMONT TRUCK & BUS ASSOCIATION, INC., Plaintiffs, Appellees, v. G. STEVEN ROWE, in his official capacity as Attorney General for the State of Maine, Defendant, Appellant.

No. 05-2136.

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

448 F.3d 66; 2006 U.S. App. LEXIS 12264

May 19, 2006, Decided

COUNSEL: Paul Stern, Deputy Attorney General, with whom G. Steven Rowe, Attorney General, Melissa Reynolds O'Dea, Peter B. LaFond, and Christopher C. Taub, Assistant Attorneys General, Office of the Attorney General, were on brief, for appellant.

Ruth N. Borenstein, with whom Paul T. Friedman, Lawrence R. Katzin, Morrison & Foerster LLP, Michael A. Nelson and Jensen Baird Gardner & Henry, were on brief, for appellees.

JUDGES: Before BOUDIN, Chief Judge, STAHL, Senior Circuit Judge, and HOWARD, Circuit Judge.

OPINION BY: HOWARD

OPINION:

HOWARD, Circuit Judge. In 2003, Maine enacted a law to restrict and regulate the sale and delivery of tobacco products purchased via the internet or other electronic means. Several trade associations, representing air and motor carriers of property, brought this action against the

Maine Attorney General alleging that certain provisions of this law are preempted by the Federal Aviation Administration Authorization Act of 1994 (FAAAA). The district court granted summary judgment for the associations and enjoined Maine's Attorney General from enforcing the law. We affirm in all respects but one.[1]

I.

A. The FAAAA

There are two FAAAA preemption provisions at issue in this case. *See* Pub. L. No. 103-305, § 601; 108 Stat. 1569. The first provides that a "State . . . may not enact or enforce a law . . . related to a price, route, or service of any motor carrier . . . with respect to the transportation of property." 49 U.S.C. § 14501(c)(1). The second states that a "State may not enact or enforce a law . . . related to a price, route, or service of an air carrier or carrier affiliated with a direct air carrier through common controlling ownership when such carrier is transporting property by aircraft or by motor vehicle. . . ." 49 U.S.C. § 41713(b)(4)(A).

These provisions combine to bar states (subject to certain exceptions discussed later) from enacting laws related to prices, routes, or services of air or motor carriers of property. They are "intended to function in the exact same manner with respect to [their] preemptive effects." H.R. Conf. Rep. 103-677 at 85, *reprinted in* 1994 U.S.C.C.A.N. at 1757.

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[1] We are grateful for the amicus curiae briefs filed by several state attorneys general, the American Trucking Association, the Federal Express Corporation and the United States Chamber of Commerce.

B. The Maine Tobacco Delivery Law

In 2003, the Maine Legislature adopted "An Act to Regulate the Sale of Tobacco Products and to Prevent the Sale of Cigarettes to Minors." *See* L.D. 1236 (121st Maine Leg.) (codified at 22 M.R.S.A. §§ 1551, 1555-C & 1555-D) (Tobacco Delivery Law). The Tobacco Delivery Law was prompted by the recent increase in internet tobacco sales which are consummated by direct delivery to consumers through the mail or by commercial carriers. *See* Testimony of Representative Glen Cummings Before the Joint Standing Committee on Health & Human Services (Apr. 29, 2003). This phenomenon has complicated Maine's efforts to regulate "the sale of tobacco products to minors" and caused it to lose "tremendous tax revenues as a result of tax free sales by unlicensed companies." *Id.* The associations persuaded the district court that §§ 1555-C(3)(C) & 1555-D are preempted by the FAAAA.

1. § 1555-C(3)(C)

Maine's Tobacco Delivery Law permits a licensed tobacco retailer to sell tobacco products[2] directly to consumers via the internet or other electronic means so long as the retailer takes specified steps to ensure that sales are not made to minors. *See id.* §§ 1555-C(2) & (3). One such step requires the retailer to use a carrier that will ensure that: (1) the purchaser of the tobacco products is the same person as the addressee of the package; (2) the

[2] Tobacco products are broadly defined to include "any form of tobacco and any material or device used in the smoking, chewing, or other form of tobacco consumption, including cigarette papers and pipes." 22 M.R.S.A. § 1551(3).

addressee is of legal age to purchase tobacco products and sign for the package; and (3) if the addressee is under 27 years of age, that she show a valid government-issued identification verifying that she is old enough to purchase tobacco products. *Id.* § 1555-C(3)(C). Penalties are imposed only against the retailer for violations of this provision. *See id.* §§ 1555-C(3)(E) & (F).

2. § 1555-D

Section 1555-D makes it illegal for any person to knowingly deliver tobacco products to a Maine consumer if the products were purchased from an unlicensed retailer.[3] The section also states that a person delivering a package "is deemed to know" that the package contains tobacco products if it (1) so indicates on any side other than the side directly opposite the label, *see* Code of Me. R. ch. 203, § 11, or (2) was shipped by a person listed by the Attorney General as an unlicensed tobacco retailer.[4]

C. The Effect of the Tobacco Delivery Law on United Parcel Service (UPS)

As discussed in further detail below, one way for the associations to prove that the challenged provisions of the Tobacco Delivery Law are preempted by the FAAAA is to demonstrate that they have a forbidden significant effect

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[3] It does not, however, bar the delivery of tobacco products purchased from an unlicensed retailer to a licensed tobacco retailer or distributor operating in Maine. *See id.*

[4] The Attorney General maintains a list of unlicensed tobacco retailers that he distributes to carriers operating in Maine. 22 M.R.S.A. § 1555-D (2).

on carrier services. *See infra* at 25. The associations have attempted to make this showing by highlighting the effect of the challenged provisions on UPS, a motor/air carrier of property operating in Maine.[5]

UPS, which delivers approximately 65,000 packages per day in Maine, offers door-to-door delivery service of packages and delivery of packages on an express basis. Its delivery operations function as an integrated system, requiring extensive planning and coordination among its operating facilities and ground and air fleet. Delays and disruptions in the sorting and delivery of packages can affect the timely delivery of thousands of packages within the UPS system.

Prior to the enactment of § 1555-C(3)(C), UPS did not require that its drivers deliver a package only to the addressee, and it did not require a signature from the recipient of the package unless the shipper paid a premium for this additional service. UPS determined that it would not be feasible to alter its delivery operations to provide these new services in Maine, so it stopped delivering all tobacco products to Maine consumers.

To make deliveries of tobacco products to licensed retailers and distributors in Maine as permitted by § 1555-D, UPS now has modified its uniform package delivery procedures to identify packages that contain tobacco products. UPS requires that its preloaders in Maine (the employees who place the packages on the trucks for delivery) specially examine each package to determine if it

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[5] While the associations rely on UPS' experience to prove that the Tobacco Delivery has a forbidden significant effect on carriers, UPS is not a party to this action.

is marked as containing tobacco or if the name of the addressee or shipper indicates that the package likely contains tobacco.[6] Packages identified as likely containing tobacco products are then segregated so that UPS employees can research whether the package is destined for a licensed tobacco retailer or distributor. If UPS determines that the addressee is not a licensed tobacco retailer or distributor, it arranges to return the package to the shipper or otherwise to dispose of the package.

D. The District Court Decision

Proceeding from the premise that the FAAAA preempts a state law if it "expressly references" a carrier's prices, routes, or services or has a "forbidden significant effect" on the same, the district court concluded that the challenged provisions of the Tobacco Delivery Law are preempted by the FAAAA. *See N.H. Motor Transp. Ass'n v. Rowe,* 377 F. Supp. 2d 197, 210 (D. Me. 2005) (citing *United Parcel Serv., Inc. v. Flores-Galarza,* 318 F.3d 323, 334-35 (1st Cir. 2003) (*UPS I*)). The court determined that, while § 1555-C(3)(C) did not expressly reference carrier services because that section is directed only at retailers of tobacco products, it has a forbidden significant effect on UPS because, for the carrier to accept packages containing tobacco for delivery in Maine, it would have to adopt procedures that would "alter [its] delivery practices" for these packages. *Id.* at 216.

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[6] UPS does not cross-reference packages against the Attorney General's list to determine if the shipper is listed as an unlicensed tobacco retailer.

The court also ruled that § 1555-D both expressly references and has a forbidden significant effect on carrier services. It concluded that the provision expressly references services because it prohibits carriers from delivering a certain class of tobacco products, i.e., tobacco products purchased by Maine consumers from unlicensed retailers. *See id.* at 211-12. It also concluded that the provision also has a forbidden significant effect because it forced UPS to depart from "its nationally uniform procedure" by inspecting each package to identify the contents. *Id.* at 212. The Attorney General timely appealed from this ruling.[7]

II.

A. Jurisdiction

Before reaching the merits of the Attorney General's appeal, we consider two threshold jurisdictional issues. The Attorney General asserts that the associations lack standing and that the action is moot in light of events occurring subsequent to the noticing of the appeal.

1. Standing

The associations invoke the representational standing doctrine recognized by the Supreme Court in *Hunt v. Washington State Apple Adver. Comm'n*, 432 U.S. 333, 343, 97 S. Ct. 2434, 53 L. Ed. 2d 383 (1977). Under this doctrine, "an association has standing to bring suit on behalf

[7] The district court found that another section of the Tobacco Delivery Law, which requires the shipper of tobacco products to inform the carrier of the age of the purchaser, was not preempted. *Id.* at 217 (citing 22 M.R.S.A. § 1555-C(3)(A)). The associations have not cross-appealed from this ruling.

of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individualized members in the lawsuit." *Id.*

The Attorney General focuses his argument on the third *Hunt* factor. He contends that evidence concerning the effect that the challenged provisions of the Tobacco Delivery Law have on UPS suffices only to justify preemption of the challenged provisions as to UPS. Preemption against other carriers should occur only to the extent that the other carriers individually prove that the challenged provisions have a forbidden significant effect on their prices, routes, or services.

The district court rejected this argument, observing that "[a]ssociational standing is . . . granted in cases seeking injunctive relief rather than damages, because individualized proof is not necessary and the relief usually inures to the benefit of all members injured." *N.H. Motor Transp. Ass'n v. Rowe,* 324 F. Supp. 2d 231, 236 (D. Me. 2004). Because the associations only sought an injunction and a declaratory judgment against the challenged provisions, the court ruled that the third *Hunt* factor was satisfied. *See id.* at 236 (citing *Playboy Enters., Inc. v. Pub. Serv. Comm'n of P.R.,* 906 F.2d 25, 35 (1st Cir. 1990)).

After the district court issued this ruling, we clarified the requirements for establishing the third *Hunt* factor. In so doing, we acknowledged that "there is no well developed test in this circuit as to how the third prong of the *Hunt* test . . . applies in cases where injunctive relief is sought." *Pharmaceutical Care Mgmt. Ass'n v. Rowe,* 429 F.3d 294,

313-14 (1st Cir. 2005). But we did not embrace the proposition that, under *Playboy Enters.* the third *Hunt* factor is always satisfied where an association seeks injunctive relief on behalf of all of its members. *See Rowe,* 429 F.3d at 314 ("*Playboy* is not an open door for association standing in all injunction cases where member circumstances differ and proof of them is important."). We concluded that representational standing is inappropriate if adjudicating the merits of an association's claim requires the court to engage in a "fact-intensive-individual inquiry." *Id.* (quoting *Penn. Psychiatric Soc. v. Green Spring Health Servs., Inc.,* 280 F.3d 278, 287 (3d Cir. 2002)). We therefore turn to whether the associations' preemption claim requires a sufficiently fact-intensive inquiry to preclude representational standing.

The FAAAA provides that a state law is preempted if it relates to the prices, routes, or services of "*any* motor carrier" or "*an* air carrier." 49 U.S.C. §§ 14501(c) & 41713(b)(4)(A) (emphases supplied). "Any" means "one ... of whatever kind," and "an" means "one." *Merriam Webster's Collegiate Dictionary* at 40, 53 (10th ed.2001). The language of the FAAAA accordingly suggests that, if a state law is preempted as to one carrier, it is preempted as to all carriers.[8] *See N.H. Motor Transp. Ass'n,* 377 F. Supp. 2d at 219. Such a reading accords with one of the FAAAA's central purposes: to establish a "level playing field" among carriers. H.R. Conf. Rep. 103-677 at 85, *reprinted in* 1994 U.S.C.C.A.N. at 1757; *see Californians for Safe Dump*

[8] Even if "an" as used in § 41713(b)(4)(A) is ambiguous, "any" as used in § 14501(c) is clear, and Congress has emphasized that these provisions were intended to "function in the exact same manner." H.R. Conf. Rep. 103-677 at 85, *reprinted in* 1994 U.S.C.C.A.N. at 1757.

Truck Transp. v. Mendonca, 152 F.3d 1184, 1187 (9th Cir. 1998). If preemption were judged on a carrier-specific basis, the result would be a "patchwork" of state laws applying to some carriers and not to others, depending on which carriers proceeded to litigation. H.R. Conf. Rep. 103-677 at 87 *reprinted in* 1994 U.S.C.C.A.N. at 1759. Such a result would undermine Congress' goal of encouraging uniformity in carrier regulation. Thus, the associations can prevail by establishing that the challenged provisions of the Tobacco Delivery Law have a forbidden significant effect on one carrier. The district court correctly ruled that the associations have standing to press their preemption claim. *See Rowe*, 429 F.3d at 314.[9]

2. Mootness

After the district court granted summary judgment, UPS settled an enforcement action brought by the New York Attorney General under a New York law restricting the ability of carriers to deliver cigarettes to consumers. *See* N.Y. Pub. Health Law § 1399-ll(2) (McKinney 2001). In that settlement, UPS promised to stop "shipping cigarettes to individual consumers in the United States while still permitting lawful shipments of cigarettes to licensed tobacco businesses." To fulfill this promise, UPS agreed (1) to identify all shippers that may be cigarette retailers and

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[9] The Attorney General also argues that representational standing should not be allowed because "the increased use of [representational] standing by large businesses [makes] the defense of suits . . . more difficult by controlling discovery and access to information." We do not foreclose the possibility that representational standing may be improper in a particular case because of some hardship imposed on a defendant in conducting discovery. But the Attorney General has not attempted to demonstrate such a hardship here.

advise them that UPS will not accept cigarettes for delivery to consumers; (2) to discipline shippers that violate UPS's non-delivery policy; (3) to impose measures to ensure that employees "actively" look for indications that a package contains cigarettes; and (4) to instruct drivers not to deliver cigarette packages to consumers.

The Attorney General argues that, as a result of the settlement, this appeal has become moot, the judgment should be vacated and the case should be dismissed. *See Duke Power Co. v. Greenwood County,* 299 U.S. 259, 267, 57 S. Ct. 202, 81 L. Ed. 178 (1936) (stating that where a case becomes moot while on appeal, the appellate court must set aside the judgment and remand the case with instructions that it be dismissed). He contends that, by agreeing not to deliver cigarettes directly to consumers throughout the United States and directing employees actively to look for cigarettes, UPS is no longer affected by the Tobacco Delivery Law.

Article III considerations require that an actual case or controversy exist between the parties throughout the course of litigation. *See Ramirez v. Sanchez Ramos,* 438 F.3d 92, 100 (1st Cir. 2006). A case must be dismissed as moot "if, at some time after the institution of the action, the parties no longer have a legally cognizable stake in the outcome." *Goodwin v. C.N.J., Inc.,* 436 F.3d 44, 46 (1st Cir. 2006). This rule applies even where the case becomes moot while pending on appeal. *See Great Western Sugar Co. v. Nelson,* 442 U.S. 92, 93, 99 S. Ct. 2149, 60 L. Ed. 2d 735 (1979) (per curiam). But "[t]he burden of establishing mootness rests squarely on the party raising it, and the burden is a heavy one." *Mangual v. Rotger-Sabat,* 317 F.3d 45, 60 (1st Cir. 2003) (citation omitted). To establish mootness, the party raising it must show that the court cannot

grant any "effectual relief whatever" to its opponent. *Church of Scientology of Cal. v. United States,* 506 U.S. 9, 12, 113 S. Ct. 447, 121 L. Ed. 2d 313 (1992).

The Attorney General has not met this heavy burden. The New York settlement agreement applies only to the delivery of cigarettes, but the Tobacco Delivery Law applies to "any form of tobacco and any material or device used in the smoking, chewing or other form of tobacco consumption." 22 M.R.S.A. § 1551-3. UPS could therefore adhere to the terms of the settlement agreement and nevertheless violate the Tobacco Delivery Law by unlawfully delivering non-cigarette tobacco products. Because enjoining the challenged provisions would permit UPS to deliver *all* tobacco products, effectual relief remains available.

B. Preemption

We turn now to the merits of the district court's preemption ruling. We review the ruling de novo, considering the record and all reasonable inferences in the light most favorable to the Attorney General. *See Mullin v. Raytheon Co.,* 164 F.3d 696, 698 (1st Cir. 1999). We may affirm on any ground revealed by the record. *See Houlton Citizens' Coalition v. Houlton,* 175 F.3d 178, 183-84 (1st Cir. 1999).

The Attorney General presents two arguments for reversal. First, he contends that the FAAAA does not preempt state laws enacted pursuant to a state's police power to protect the health and welfare of its citizens. The Attorney General asserts that the FAAAA preempts only state laws that impose traditional economic regulation on carriers – *e.g.* entry and commodity controls, tariff filing

requirements, and price ceilings. Because the Tobacco Delivery Law does not impose such traditional economic restrictions, the Attorney General argues that the FAAAA does not apply. Alternatively, the Attorney General contends that, even if the Act applies, neither challenged provision is "related to" carrier services within the meaning of the FAAAA.

1. Applicability of the FAAAA to a State's Police-Power Enactments

A fundamental tenet of our federalist system is that constitutionally enacted federal law is supreme to state law. *See* U.S. Const. Art. VI. cl. 2. As a result, federal law sometimes preempts state law either expressly or by implication. *See Gade v. Nat'l Solid Wastes Mgmt. Ass'n,* 505 U.S. 88, 98, 112 S. Ct. 2374, 120 L. Ed. 2d 73 (1992). "Express preemption occurs when Congress has unmistakably . . . ordained that its enactments alone are to regulate a subject and state laws regulating that subject must fall." *Mass. Ass'n of Health Maintenance Organizations v. Ruthardt,* 194 F.3d 176, 179 (1st Cir. 1999) (citation omitted). In every preemption case, "the purpose of Congress is the ultimate touchstone." *Medtronic, Inc. v. Lohr,* 518 U.S. 470, 485, 116 S. Ct. 2240, 135 L. Ed. 2d 700 (1996). The primary focus is on the "plain wording" of the statute because the text "contains the best evidence of Congress' pre-emptive intent." *Sprietsma v. Mercury Marine,* 537 U.S. 51, 62, 123 S. Ct. 518, 154 L. Ed. 2d 466 (2002). But "[a]lso relevant is the structure and purpose of the statute as a whole as revealed . . . through the reviewing court's reasoned understanding of the way in which Congress intended the statute and its surrounding regulatory scheme

to affect business, consumers and the law." *Medtronic,* 518 U.S. at 486.[10]

We begin with the text. As mentioned above, the FAAAA prohibits states from enacting laws "related to a price, route, or service" of a carrier. 49 U.S.C. §§ 14501(c) & 41713(b)(4)(A). This language was patterned after the preemption provision of the Airline Deregulation Act of 1978. *See* H.R. Conf. Rep. 103-677 at 85, *reprinted in* 1994 U.S.C.C.A.N. 1757, 1759; *Mendonca,* 152 F.3d at 1184; *Desardouin v. United Parcel Serv., Inc.,* 285 F. Supp. 2d 153, 162 (D. Conn. 2003). Therefore, in addition to cases interpreting the FAAAA, we look to cases interpreting the Airline Deregulation Act. *UPS I,* 318 F.3d at 335-36; *Mastercraft Interiors, Ltd. v. ABF Freight Sys., Inc.,* 284 F. Supp. 2d 284, 287 (D. Md. 2003).

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[10] The parties devote a great deal of argument to whether we should conduct our preemption analysis with a presumption against preemption because the state law at issue was enacted to further Maine's police-power interest. *See Rice v. Santa Fe Elevator Corp.,* 331 U.S. 218, 230, 67 S. Ct. 1146, 91 L. Ed. 1447 (1947) (stating that a preemption analysis starts "with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress"). The circumstances in which the presumption is to apply are not altogether clear. *Compare Medtronic,* 518 U.S. at 485 (stating that the presumption against preemption applies "in all preemption cases") *with United States v. Locke,* 529 U.S. 89, 108, 120 S. Ct. 1135, 146 L. Ed. 2d 69 (2000) (holding the presumption inapplicable where "the State legislates in an area where there has been a history of significant federal presence"). In any event, the presumption can be overcome where the congressional purpose is sufficiently clear. *See Egelhoff v. Egelhoff* 532 U.S. 141, 151, 121 S. Ct. 1322, 149 L. Ed. 2d 264 (2001). For the reasons discussed *infra,* we think that the congressional intent to preempt state police-power enactments that are related to carrier prices, routes, or services is sufficiently clear to overcome any presumption that would apply here.

The seminal case is *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 112 S. Ct. 2031, 119 L. Ed. 2d 157 (1992). Like the FAAAA, the version of the Airline Deregulation Act considered in *Morales* preempted state laws "relating to rates, routes or services of any air carrier." [11] The Court identified "relating to" as the key phrase in determining the breadth of the preemption provision and concluded that the "words . . . express a broad pre-emptive purpose." *Id.* at 383. It relied on several cases in which the Court had interpreted a similarly-worded provision of the Employment Retirement Security Act of 1974 (ERISA) preempting all state laws that "relate to" an employee benefit plan. *Id.* at 384. The *Morales* Court emphasized that this language had an "expansive sweep" and that it was "conspicuous for its breadth." *Id.* In light of Congress' use of similarly broad language, the Court concluded that Congress intended the Airline Deregulation Act to preempt any state law that has "a connection with or reference to airline rates, routes, or services." *Id.*

The FAAAA's drafters were familiar with *Morales* and approved of its reasoning. The Conference Committee Report explains that "the conferees [did] not intend to alter the broad preemption interpretation adopted by the United States Supreme Court in *Morales*. . . ." H.R. Conf. Rep. 103-677 at 83, *reprinted in* 1994 U.S.C.C.A.N. at 1755. The sweep of the FAAAA's text and the drafters' expressed intent to use *Morales* as a roadmap are strong evidence that the FAAAA was not intended to preempt

[11] In 1994 Congress replaced "relating" with "related" and "rates" with "price" but did not intend these revisions to substantively change the law. *See* Pub. L. No. 103-272, § 1(a); 108 Stat. 745. This provision is currently codified at 49 U.S.C. § 41713(b)(1).

only a narrow class of economic regulations while excluding the many laws enacted by the states under their police powers. If Congress had such a limited purpose in mind, it likely would have employed narrower language in fashioning the FAAAA preemption provisions. *Cf. Botz v. Omni Air Int'l*, 286 F.3d 488, 493-94 (8th Cir. 2002) ("Although Congress could easily have selected more restrictive terminology to describe the type of . . . enactment the [Airline Deregulation Act] pre-empts, the provision as written is without language that would produce a more limited pre-emptive effect.").

The Attorney General argues that we should disregard *Morales* because, post-*Morales*, the Supreme Court has narrowed its understanding of ERISA's "relat[ing] to" language. We previously rejected this identical argument:

> The Secretary argues that the broad preemption standard adopted in *Morales* has been overruled by a number of Supreme Court cases narrowing the preemptive effect of [ERISA]. While the *Morales* Court undoubtedly took its interpretive cues from the ERISA preemption jurisprudence then in existence, it does not follow that any change in the ERISA law necessitates a parallel change in the law affecting . . . carriers. As Judge Easterbrook has put it: [I]f developments in pension law have under-cut holdings in air-transportation law, it is for the Supreme Court itself to make the adjustments. Our marching orders are clear: follow decisions until the Supreme Court overrules them.

UPS I, 318 F.3d at 335 n. 19 (quoting *United Airlines, Inc. v. Mesa Airlines, Inc.*, 219 F.3d 605, 608 (7th Cir. 2000)). Absent extraordinary circumstances not present here, we are not at liberty to disregard this ruling. *See United*

States v. Wogan, 938 F.2d 1446, 1449 (1st Cir. 1991) ("We have held, time and again, that in a multi-panel circuit, prior panel decisions are binding upon newly constituted panels in the absence of supervening authority sufficient to warrant disregard of established precedent.").

We look also to the FAAAA's structure and legislative history. The FAAAA includes a series of exceptions to the general preemption rule. The excepted areas are:

> the safety regulatory authority of a State with respect to motor vehicles, the authority of a State to impose highway route controls or limitations based on the size or weight of the motor vehicle or the hazardous nature of the cargo, or the authority of a State to regulate motor carriers with regard to minimum amounts of financial responsibility relating to insurance requirements and self-insurance authorization.

49 U.S.C. §§ 14501(c)(2) & 41713(b)(4)(B)(i). The Attorney General acknowledges that the challenged provisions of the Tobacco Delivery Law do not fall within any of these exceptions. He contends, however, that these statutory exceptions suggest broader congressional purpose to permit states to regulate carriers to protect citizen health and safety. The Attorney General points to a passage from the FAAAA's legislative history indicating that the enumerated exceptions were "not intended to be all inclusive," H.R. Conf. Rep. 103-677 at 84, *reprinted in* 1994 U.S.C.C.A.N. at 1756, to argue that we may establish an additional exception to FAAAA preemption for laws enacted pursuant to a state's police power to protect the health and welfare of its citizens.

We have cautioned that an overly broad interpretation of the FAAAA exceptions "would swallow the rule of

preemption." *United Parcel Serv., Inc. v. Flores-Galarza*, 385 F.3d 9, 14 (1st Cir. 2004) (*UPS II*). An exclusion from preemption for police-power enactments would surely "swallow the rule of preemption," as most state laws are enacted pursuant to this authority. *Id.* The exceptions preserving the states' authority to regulate motor vehicles do not support the Attorney General's argument. *See id.* (rejecting an argument that the FAAAA preemption exceptions indicate a congressional intent to preserve state authority over safety issues generally).

While the statute's structure does not support the Attorney General's police-power argument, there is some support in the legislative history for his view that the FAAAA preempts only state economic regulation. The Conference Committee Report observed that "[s]tate economic regulation of motor carriers . . . is a huge problem for national and regional carriers attempting to conduct a standard way of doing business." H.R. Conf. Rep. No. 103-677 at 85, *reprinted in* 1994 U.S.C.C.A.N. at 1757. The conferees identified "typical forms" of harmful regulation to include "entry controls, tariff filing, price regulation," and regulation of the "types of commodities carried." *Id.* at 1758. This history led the Supreme Court to remark that "the problem to which the [FAAAA] congressional conferees attended was state economic regulation." *Columbus v. Ours Garage & Wrecker Serv.*, 536 U.S. 424, 440, 122 S. Ct. 2226, 153 L. Ed. 2d 430 (2002). This history, however, does not indicate that preempting economic regulation was the FAAAA's only purpose. And, in any event, the legislative history cannot trump the statute's text. *See Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 521, 112 S. Ct. 2608, 120 L. Ed. 2d 407 (1992) (declining to adopt a limited interpretation of a preemption

provision suggested by legislative history because "the language of the [cigarette labeling] Act plainly reaches" further); *Morales,* 504 U.S. at 385 n.2. (The "legislative history need not confirm the details of changes in the law effected by statutory language before we will interpret that language according to its natural meaning."). Congress often acts to address a specific problem but ultimately settles on a broader remedy. *See Penn. Dep't of Corr. v. Yeskey,* 524 U.S. 206, 213, 118 S. Ct. 1952, 141 L. Ed. 2d 215 (1998) ("[T]he fact that a statute can be applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth.").

In addition, the legislative history reveals a second goal for FAAAA preemption which is inconsistent with the Attorney's General argument: "to create a completely level playing field between air carriers . . . on the one hand and motor carriers on the other." H.R. Conf. Rep. 103-677 at 85, *reprinted in* 1994 U.S.C.C.A.N. at 1757. In other words, the conferees intended the scope of FAAAA and Airline Deregulation Act preemption to be coterminous. *See Ace Auto Body & Towing Ltd. v. City of New York,* 171 F.3d 765, 772 (2d Cir. 1999); *Mendonca,* 152 F.3d at 1187.

In the Airline Deregulation Act context, the Supreme Court has focused on the effect that a state law has on carrier operations, not on the state's purpose for enacting the law. In *Morales,* the Court found that the Airline Deregulation Act preempted a directive promulgated by several state attorneys general informing airlines that certain advertising practices would be considered to violate state consumer-protection laws. 504 U.S. at 379. And, in *American Airlines, Inc. v. Wolens,* 513 U.S. 219, 227-28, 115 S. Ct. 817, 130 L. Ed. 2d 715 (1995), the Court

held that the Airline Deregulation Act preempted a cause of action under the Illinois Consumer Fraud Act concerning the redemption of frequent-flier miles. In both cases, the Court's preemption analysis centered on the impact that the challenged state laws had on airline services and rates and not on the fact that the preempted laws were enacted pursuant to the states' police power to combat consumer fraud. *See Fla. Lime & Avocado Growers v. Paul,* 373 U.S. 132, 150, 83 S. Ct. 1210, 10 L. Ed. 2d 248 (1963) (describing the traditional state authority to pass laws to combat consumer fraud). The Court reached these conclusions over dissents by Justice Stevens arguing (similarly to the Attorney General here) that the state laws at issue should not be preempted because there was insufficient evidence of congressional intent to preempt state police-power enactments. *See Am. Airlines,* 513 U.S. at 235-31 (Steven, J. dissenting in part); *Morales,* 504 U.S. at 419-27 (Stevens, J., dissenting).

Morales and *American Airlines* thus teach that, under the Airline Deregulation Act, the focus should be on the *effect* that the state law has on airline operations. Accepting the Attorney General's argument would shift the analysis under the FAAAA away from that state law's effect and towards the state's *purpose* for enacting the law. A purpose-related limitation on FAAAA preemption would thus inevitably create a gap between the scope of FAAAA and Airline Deregulation Act preemption – a gap which the FAAAA drafters sought to avoid.

In the end, the Attorney General's argument founders because it cannot be reconciled with the FAAAA's text. The Act's drafters chose to express the preemptive scope of the FAAAA in words that they understood to be exceedingly broad. In the preemption context, we are to give effect to

the ordinary meaning of a congressional enactment "unless there is good reason to believe that Congress intended the language to have some more restrictive meaning." *Cipollone,* 505 U.S. at 521. We do not find a sufficiently compelling basis in either the structure or history of the FAAAA to interpret the Act contrary to its "deliberately expansive text." *Morales,* 504 U.S. at 384. We therefore conclude that the FAAAA preempts state police-power enactments to the extent that they are "related to" a carrier's prices, routes, or services.[12]

2. FAAAA Preemption of the Tobacco Delivery Law

We turn now to whether the challenged provisions of the Tobacco Delivery Law are preempted because they are "related to" carrier services. The parties do not contest that carriers provide the service of delivering "packages on an express or time-guaranteed basis." *See N.H. Motor*

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[12] The Attorney General offers a narrower argument for excluding from FAAAA preemption state laws intended to address underage smoking. He cites the Synar Amendment, a federal law conditioning the states' receipt of certain federal funds on their enacting laws to ban the sale of tobacco products to minors. *See* 42 U.S.C. § 300x-26. The Attorney General contends that the Synar Amendment demonstrates Congress' intent that the states be able to regulate the delivery of tobacco products irrespective of the FAAAA. We disagree. The Synar Amendment indicates Congress' intent that the states take the lead in addressing the underage smoking problem. But the Attorney General has not identified any evidence that Congress intended the states do so in derogation of other federal laws. The FAAAA and Synar Amendment can exist harmoniously because the states may pass laws to curb underage smoking without passing laws "related to" carrier prices, routes, or services. *See UPS I,* 318 F.3d at 333-34 (stating that courts should endeavor to read congressional enactments in harmony whenever possible).

Transp. Ass'n, 377 F. Supp. 2d at 209 (quoting *UPS I,* 318 F.3d at 336). But they disagree over whether the challenged provisions are "related to" this service.

We have previously interpreted the phrase "related to" as used in the FAAAA:

> The phrase "related to" has a broad meaning in ordinary usage: to stand in some relation; to have bearing or concern; to pertain; refer; to bring in association or connection with. When used in a preemption provision, such as [in the FAAAA], it has a similarly broad reach. State laws and regulations having a connection with or reference to a . . . carrier's . . . services are preempted under the [FAAAA]. A sufficient nexus exists if the law expressly references the . . . carriers' . . . services or has a forbidden significant effect on the same.

UPS I, 318 F.3d at 335. We therefore consider whether the district court correctly concluded that the challenged provisions of the Tobacco Delivery Law either expressly reference carrier services or have a forbidden significant effect on UPS' services.

We begin with § 1555-C(3)(C). As set forth above, this statute requires tobacco retailers seeking to ship tobacco products directly to Maine consumers to use only carriers that deliver the package directly to the addressee/purchaser, require a signature from the addressee/purchaser, and conduct age verification if the addressee/purchaser is under 27 years of age. Another section penalizes retailers that use carriers that do not provide these services. 22 M.R.S.A. §§ 1555-C(3)(E) & (F).

Section 1555-C(3)(C) expressly references a carrier's service of providing the timely delivery of packages. The statute prescribes the method by which a carrier operating in Maine must deliver packages containing tobacco products in a way that would affect the ability of the carrier to meet package-delivery deadlines. Delays in searching for the purchaser, making multiple delivery attempts if the purchaser cannot be located, obtaining the purchaser's signature, and verifying the purchaser's age all could affect timely deliveries. *See UPS I,* 318 F.3d at 336 (finding that the FAAAA preempted a state law that "affect[ed] the timeliness and effectiveness" of a carrier's service).

The Attorney General responds that there is no FAAAA preemption because § 1555-C(3)(C) regulates *retailers* of tobacco products and not carriers. He also argues that we should decline to find preemption because any carrier can avoid the requirements of § 1555-C(3)(C) by declining to provide tobacco-product deliveries to Maine consumers.

The Attorney General's first argument amounts to a claim that there can be no FAAAA preemption unless the state law imposes a direct regulation on carriers. This argument cannot be squared with the FAAAA's text because it reads the broad phrase "related to" out of the statute and replaces it with the narrower term "regulates." *See Morales,* 504 U.S. at 385. (rejecting an argument that would have read "relating to" out of the Airline Deregulation Act and replaced it with "regulate"); *UPS I,* 318 F.3d at 335 (rejecting an argument for narrowing scope of the FAAAA that "would read 'the related to language' out of the statute").

Moreover, limiting preemption to direct regulation of carriers is inconsistent with the FAAAA's purpose to bar

states from policing carrier operations. *See Am. Airlines*, 513 U.S. at 228. A state may use its coercive power to cause carriers to conform to state-imposed rules in at least two ways: it may directly regulate carriers or it may limit retailers to hiring only those carriers that comply with the state-imposed mandates. Either way the state is employing its coercive power to police the method by which carriers provide services in the state. In short, the Attorney General's argument would lead to the untenable result of permitting states to regulate carrier services indirectly by regulating shippers. *Cf. Abington Sch. Dist. v. Schemp*, 374 U.S. 203, 230, 83 S. Ct. 1560, 10 L. Ed. 2d 844 (1963) (declining to adopt an interpretation that would permit states to do indirectly what they cannot do directly).

The Attorney General's alternative argument – that there is no preemption because a carrier can forgo certain tobacco-product deliveries in Maine – also fails. Declining to find preemption simply because a carrier can limit its in-state business to avoid a particular requirement would undermine the FAAAA's goal of creating an environment in which "[s]ervice options will be dictated by the marketplace," and not by state regulatory regimes. H.R. Conf. Rep. 103-677 at 88, *reprinted in* 1994 U.S.C.C.A.N. at 1760. The district court correctly concluded that the FAAAA preempts § 1555-C(3)(C).

We turn finally to whether the FAAAA preempts § 1555-D. In considering this question, we are mindful that courts should "not nullify more of a legislature's work than is necessary, for . . . a ruling of unconstitutionality frustrates the intent of the elected representative of the people." *Ayotte v. Planned Parenthood of N. New England*, 126 S. Ct. 961, 967, 163 L. Ed. 2d 812 (2006) (internal citation omitted). The first part of § 1555-D makes it

unlawful for any person knowingly to deliver to Maine consumers certain contraband tobacco products – *i.e.*, those tobacco products purchased by consumers from unlicensed retailers. The second part of § 1555-D charges a carrier with knowledge that a package contains tobacco products if the package is so marked or if the shipper appears on the Attorney General's list of unlicensed tobacco retailers.

Under Maine law, tobacco products purchased by a consumer from an unlicensed retailer are contraband. *See* 22 M.R.S.A. § 1555-C(7). The first part of § 1555-D is a corollary to § 1555-C(7) in that it makes the knowing delivery of contraband tobacco products illegal. Thus, the question we face is whether a generally applicable law barring any person from knowingly delivering contraband tobacco is preempted by the FAAAA insofar as the law pertains to carriers.

While the FAAAA's preemptive effect is broad, *see UPS I,* 318 F.3d at 335, it is not unlimited, *see Mendonca,* 152 F.3d at 1188. State laws that only have a "tenuous, remote, or peripheral" relation to services are beyond the FAAAA's reach. *Morales,* 504 U.S. at 390; *Mendonca,* 152 F.3d at 1188. In describing this limitation on preemption in the Airline Deregulation Act context, the Supreme Court explained that its broad interpretation of the statute's preemption provision did not place it "on a road that leads to pre-emption of gambling and prostitution as applied to airlines." *Morales,* 504 U.S. at 390. We understand the *Morales* Court to have meant that states may continue to enjoy the power to ban primary conduct, and that the ADA and FAAAA do not preempt laws applying these prohibitions to airlines and carriers.

Accordingly, *Morales* suggests that § 1555-D's ban on the knowing delivery of contraband tobacco products is not preempted by the FAAAA – even only insofar as it pertains to carrier services. Section 1555-D requires that carriers do not act as *knowing* accomplices in the illegal sale of tobacco products. It does not, however, require that carriers modify their delivery methods other than by declining to transport a product that Maine has legitimately banned. We think that this effect on services is "too tenuous" to warrant preemption. *Mendonca,* 152 F.3d at 1189 (stating that a state law is too tenuous to be preempted by the FAAAA where the law does not frustrate the FAAAA's deregulatory purposes).

If the rule were otherwise, states would be unable to bar a primary method by which contraband crosses state lines. We do not believe that this was Congress' intent in enacting the FAAAA. Other courts applying the FAAAA to prohibitions on the delivery of contraband tobacco have reached similar conclusions. *See Robertson v. Liquor Control Bd.,* 102 Wn. App. 848, 10 P.3d 1079, 1084-85 (Wash. App. Ct. 2000) (concluding that the FAAAA did not preempt a state law banning the transport of contraband cigarettes because otherwise "a motor carrier would be exempt from forfeiture for transporting a methamphetamine lab or poached game"); *see also N.Y. State Motor Truck Ass'n v. Pataki,* No. 03-CV-2386 (GBD), 2004 WL 2937803, at *6 (W.D.N.Y. Aug. 19, 2003) (concluding that the FAAAA did not preempt a state law making it unlawful for carriers to deliver cigarettes directly to New York consumers because "the mere fact that a statute concerns the transportation of a particular cargo by . . . carriers . . . does not render it . . . unconstitutional on preemption grounds"); *Ward v.*

New York, 291 F. Supp. 2d 188, 210-211 (S.D.N.Y. 2004) (similar).[13]

But, while Maine may ban a carrier from knowingly transporting contraband tobacco products, it may not dictate the procedures that a carrier should employ to locate these products in its delivery chain. *See UPS I*, 318 F.3d at 336 (concluding that the FAAAA preempted a Puerto Rico revenue-collection scheme that mandated procedures that carriers had to follow to deliver certain packages). The second part of § 1555-D violates this principle.

As noted, § 1555-D imposes upon a carrier constructive knowledge that it has delivered a tobacco product if the package containing the product is marked as containing tobacco or if the seller's name appears on the Attorney General's list. As UPS' experience demonstrates, a carrier seeking to comply with § 1555-D must specially inspect every package destined for delivery in Maine. Once the carrier has finished this inspection, it must segregate the

[13] There are many state laws barring the transport and delivery of contraband. *E.g.*, Ala. Code § 2-14-5 (barring transport of certain products related to bee keeping); Ariz. Rev. Stat. § 3-209 (barring the transport of quarantined produce); Ariz. Rev Stat. § 13-3102 (barring transport of prohibited weapons); Cal. Bus. & Prof. Code § 17533.9 (barring transport of tear gas); Cal. Fish & Game Code § 4800 (barring the transport of mountain lions); N.Y. Penal Law § 190.50 (barring transport of slot machines or other gambling devices). We have not a found a single case, outside the tobacco context, in which bans on the transport of contraband have been challenged as preempted by the FAAAA. *Cf.* Sir Arthur Conan Doyle, *Silver Blaze* (1890) (William S. Baring-Gould, ed., *The Annotated Sherlock Holmes*, Vol. II, 1967) (Detective Gregory: " 'Is there any other point to which you would wish to draw my attention?' Sherlock Holmes: 'To the curious incident of the dog in the night-time.' Gregory: 'The dog did nothing in the night-time.' Holmes: 'That was the curious incident.' ").

packages that contain tobacco and research whether the addressee is a Maine-licensed retailer or distributor who can receive the package. While the second part of § 1555-D does not expressly reference carrier services, it "impermissibly affect[s] . . . services . . . because it requir[es] UPS to identify the contents of the packages (a deviation from standard procedures used in deliveries elsewhere in the United States). . . ." *UPS II,* 385 F.2d at 14 (parenthesis in original). UPS can only provide timely package delivery if it follows uniform procedures that allow for "an orderly flow of packages." *UPS I,* 318 F.3d at 336. Because the second part of § 1555-D has the effect of forcing UPS to change its uniform package-processing procedures, the district court correctly found it to be preempted.[14]

In reaching this conclusion, we recognize that there is a potential tension between saying that, on the one hand, Maine is free to punish the knowing delivery of material that it has classified as contraband, while, on the other hand, ruling that it may not dictate or interfere with a carrier's delivery procedures. What we are saying here, however, is that Maine cannot use the mechanisms outlined in the statute to *impute* knowledge based on a failure to read labels or consult lists – an imputation which would amount to prescribing how carriers must operate.

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[14] The Attorney General argues that the associations have failed to establish a forbidden significant effect on UPS because they did not offer studies conducted by UPS on the cost of compliance. We agree with the district court that there is no such quantification requirement. The cases in this area have looked to the logical effect that a particular scheme has on the delivery of services or the setting of rates and have not required the presentation of empirical evidence. *See N.H. Motor Transp. Ass'n,* 377 F. Supp. 2d at 217 n. 92 (collecting cases).

If, however, Maine could prove that a carrier employee had actual knowledge that a package being delivered was contraband tobacco, then it might have a colorable enforcement case – although such circumstances, as a practical matter, may be difficult to prove. True, the "related to" language could stretch to such a case but it could also stretch to the knowing delivery of hard drugs – and Congress cannot have intended such a result.

III.

"[T]obacco use, particularly among children and adolescents, poses perhaps the single most significant public health problem in the United States." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 161, 120 S. Ct. 1291, 146 L. Ed. 2d 121 (2000). There is no question that Maine has sought to achieve a worthy objective by passing the Tobacco Delivery Law to combat this pernicious problem. *See N.H. Motor Transp. Ass'n,* 377 F. Supp. 2d at 219. But the FAAAA focuses on the effect that a state's law has on carriers, and not on the state's objective in passing the law. To the extent that Maine's Tobacco Delivery Law requires (or has the effect of requiring) carriers to implement state-mandated procedures in the processing and delivery of packages, it is preempted by the FAAAA. But to the extent that the Tobacco Delivery Law merely bars all persons (including carriers) from knowingly transporting contraband tobacco into Maine, the FAAAA is not implicated.

We **affirm** the judgment as it pertains to 22 M.R.S.A. § 1555-C(3)(C) and the second part of 22 M.R.S.A. § 1555-D but **reverse** the judgment as it pertains to the first part of § 1555-D. We **remand** the case to the district court with

instructions to amend the judgment consistent with this opinion. No costs are awarded.

So ordered.

NEW HAMPSHIRE MOTOR TRANSPORT ASSOCIATION, ET AL., PLAINTIFFS v. G. STEVEN ROWE, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL FOR THE STATE OF MAINE, DEFENDANT

CIVIL No. 03-178-B-H

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MAINE

377 F. Supp. 2d 197; 2005 U.S. Dist. LEXIS 10394

May 27, 2005, Decided

COUNSEL: For NEW HAMPSHIRE MOTOR TRANSPORT ASSOCIATION, MASSACHUSETTS MOTOR TRANSPORTATION ASSOCIATION, INC., VERMONT TRUCK AND BUS ASSOCIATION, INC., Plaintiffs; MICHAEL A. NELSON, Jensen, Baird, Gardner & Henry, Portland, ME; LAWRENCE R. KATZIN, PAUL T. FRIEDMAN, RUTH N. BORENSTEIN, Morrison & Foerester LLP, San Francisco, CA

For G. STEVEN ROWE, in his official capacity as Attorney General for the State of Maine, Defendant; MELISSA REYNOLDS O'DEA, PAUL D. STERN, Office of the Main Attorney General, Augusta, ME.

JUDGES: D. BROCK HORNBY, UNITED STATES DISTRICT JUDGE.

OPINION BY: D. BROCK HORNBY

OPINION: DECISION AND ORDER ON CROSS MOTIONS FOR SUMMARY JUDGMENT

The *Interstate Commerce Clause* gives Congress the authority "[t]o regulate commerce with foreign nations, and among the several States."[1] Congress has exercised this constitutional power to enact legislation that limits state authority over the transportation of goods by air and motor carriers. Does this federal legislation preempt a Maine statute that regulates carriers when they deliver tobacco products in Maine? Maine lawmakers had two worthy objectives in enacting the state statute: to reduce Maine teenagers' access to tobacco products and to collect tobacco taxes.[2] But worthy motives are not enough to avoid federal preemption, as other states learned when they tried to regulate consumer fraud or deceptive advertising in the airline industry.[3] I denied a preliminary request to enjoin enforcement of the Maine statute.[4] But now I conclude that two of the three challenged state provisions cannot survive the broad preemptive language of the federal legislation and two recent First Circuit decisions. If there is to be regulation in this area, it will have to come from the federal government.

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[1] U.S. Const. art. I, § 8, cl. 3.

[2] I have provided more detail on the reasons for the Maine legislation in *New Hampshire Motor Transport Ass'n v. Rowe* ("*N.H. Motor I*"), 301 F.Supp.2d 38, 44-45 n.12 (D.Me.2004).

[3] *See Am. Airlines, Inc. v. Wolens*, 513 U.S. 219, 228, 115 S. Ct. 817, 130 L. Ed. 2d 715 (1995); *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 388-89, 112 S. Ct. 2031, 119 L. Ed. 2d 157 (1992).

[4] *N.H. Motor I*, 301 F.Supp.2d at 46. Judge Daniels issued a similar decision in *New York State Motor Truck Ass'n v. Pataki*, 2004 WL 2937803, at *3-*6 (S.D.N.Y. Dec. 17, 2004).

I. PROCEDURAL BACKGROUND

New Hampshire Motor Transport Association, Massachusetts Motor Transportation Association and the Vermont Truck & Bus Association ("the associations") are nonprofit trade associations. Their members include motor carriers and air/ground carriers in the cargo transportation business.[5] The associations sued the Maine Attorney General, seeking a declaration that the Federal Aviation Administration Authorization Act of 1994 ("FAAAA"),[6] preempts three provisions of Maine's law regulating the retail sale and delivery of tobacco ("the Maine Tobacco

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[5] *See* Statement of Undisputed Material Facts in Support of Pls.' "As Applied" Mot. for Summ. J. ("Pls.' SMF") ¶ 1 (Docket Item 61); Def.'s Resp. to Pls.' Statement of Undisputed Material Facts ("Def.'s Responsive SMF") ¶ 1 (Docket Item 69).

The associations ask me to take judicial notice of the following items as facts "not subject to reasonable dispute" under Federal Rule of Evidence 201: the affidavits filed in their earlier motion for summary judgment; the Maine Department of Health and Human Services' ("DHHS") proposed (now final) "Rules Related to the Retail Sale and Delivery of Tobacco Products in Maine"; and the public hearing and comment period for those rules. Req. for Judicial Notice in Support of Pls.' "As Applied" Mot. for Summ. J. (Docket Item 62). The Attorney General does not object to this motion. Def.'s Resp. to Pls.' Req. for Judicial Notice (Docket Item 67).

The associations cite the affidavits only in paragraph one of their Statement of Material Facts for the basic fact, admitted by the Attorney General, that the associations engage in the commercial delivery of property. I consider the affidavits only for this limited purpose. I am not sure that Rule 201 judicial notice is necessary for the state rules and the procedures for enacting them, but I do not need to decide the issue because there is no dispute about these rules and procedures.

[6] Pub.L. No. 103-305, 108 Stat. 1569 (codified in scattered sections of 49 U.S.C.).

Delivery Law").[7] They also ask that I permanently enjoin enforcement of these provisions.

I previously denied the associations' motion for summary judgment, and granted the Maine Attorney General's subsequent motion for partial summary judgment, rejecting the argument that the FAAAA facially preempts the Maine law.[8] Both parties now move again for summary judgment. The associations continue to argue facial preemption, and also bring an as-applied challenge based upon the Maine law's effects on one of their members, United Parcel Service ("UPS").[9] The Maine Attorney

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[7] 22 M.R.S.A §§ 1551 to 1560. The associations challenge 22 M.R.S.A. §§ 1555-C(3)(A), 1555-C(3)(C) and 1555-D.

[8] *N.H. Motor Transp. Ass'n v. Rowe* ("*N.H. Motor II*"), 324 F.Supp.2d 231, 234 (D.Me.2004); *N.H. Motor I*, 301 F.Supp.2d at 46.

[9] Pls.' "As Applied" Mot. for Summ. J. with Incorporated Memo. of Law (Docket Item 60). Commentators note some confusion over the distinction between as-applied and facial challenges. *See, e.g.*, Richard H. Fallon, Jr., *As-Applied and Facial Challenges and Third-Party Standing*, 113 Harv. L.Rev. 1321, 1335-41 (2000) (discussing the relationship between facial and as-applied challenges and stating that "[f]acial challenges are not sharply categorically distinct from as-applied challenges to the validity of statutes"); Gillian E. Metzger, *Facial Challenges and Federalism*, 105 Colum. L.Rev. 873, 879-83 (2005) (addressing the confusion about what constitutes a facial challenge and noting that it arises in part from the Supreme Court's statement in *U.S. v. Salerno*, 481 U.S. 739, 745, 95 L. Ed. 2d 697, 107 S. Ct. 2095 (1987), that a facial challenge is only successful if the statute has no valid application); *see also McGuire v. Reilly*, 386 F.3d 45, 57 (1st Cir. 2004) (indicating that the standard for a facial challenge may not be as demanding as *Salerno* suggests). On this motion and throughout this case, I use the term "facial" to refer to the challenge based solely on the words of the Maine statute and "as-applied" to refer to the challenge based solely on the actual effect of the law. *See N.H. Motor II*, 324 F.Supp.2d at 233-34 n.1; *N.H. Motor I*, 301 F.Supp.2d at 40 n. 2. This distinction is based on the associations' bifurcated summary judgment approach (first asserting a challenge based on the face of the statute, then bringing this effects-based challenge) and the

(Continued on following page)

General argues that the FAAAA does not preempt the challenged provisions either facially or as applied.[10]

II. LEGAL BACKGROUND

(A) Federal Regulation of the Transportation Industry

Federal regulation of the transportation industry dates back to the Interstate Commerce Act of 1887, which created the Interstate Commerce Commission ("ICC") to regulate interstate railroad carriers.[11] Congress sought national uniformity in the regulation of interstate rail transport. It therefore limited state authority over railroad carriers (and other industries later regulated by the ICC.)[12]

Congress placed motor carriers under ICC control with the Motor Carrier Act of 1935.[13] The Motor Carrier

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Supreme Court's holding in *Morales,* 504 U.S. at 388, 112 S. Ct. 2031, that the FAAAA preempts statutes that expressly refer to (based on the face of the statute) or have a forbidden significant effect on (based on the statute's application) a carrier's prices, routes or services.

[10] Def.'s Mot. for Summ. J. with Incorporated Memo. of Law (Docket Item 64); Def.'s Opp'n to Pls.' "As Applied" Mot. for Summ. J. ("Def.'s Opp'n") at 9 (Docket Item 68).

[11] *See* Act to Regulate Commerce (Interstate Commerce Act), ch. 104, 24 Stat. 379 (1887). For a comprehensive history of federal regulation of transportation, *see* Paul Stephen Dempsey, *Transportation: A Legal History*, 30 Transp. L.J. 235 (2003).

[12] *See Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 318, 325-26, 101 S. Ct. 1124, 67 L. Ed. 2d 258 (1981); *see also W. Union Tel. Co. v. Boegli*, 251 U.S. 315, 316-17, 40 S. Ct. 167, 64 L.Ed. 281 (1920) (placing telegraph companies under ICC control showed congressional intent "to subject such companies to a uniform national rule" and thus preclude state regulation).

[13] Ch. 498, 49 Stat. 543 (1935).

Act authorized the ICC to regulate the entry, routes, business practices, rates and safety of motor carriers engaged in interstate or foreign commerce. A few years later, Congress created the Civil Aeronautics Authority, an agency similar to the ICC, to regulate air transportation.[14] The Civil Aeronautics Authority governed entry, routes, rates, business practices and safety of the airline industry. The Federal Aviation Act of 1958 recodified the Civil Aeronautics Act, continued the Civil Aeronautics Board (the reorganized form of the Civil Aeronautics Authority)[15] and established and transferred authority over safety regulation to the Federal Aviation Agency (later renamed the Federal Aviation Administration).[16]

Since the 1970s, Congress has reversed course and deregulated the transportation industry.[17] In the Airline Deregulation Act of 1978, Congress reduced federal regulation of the airline industry to encourage maximum reliance on free market competition.[18] Congress also prevented the States from interfering with federal deregulation by including a broad preemption provision prohibiting states from

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[14] *See* Civil Aeronautics Act of 1938, ch. 601, 52 Stat. 973 (1938).

[15] *See* Reorganization Plan No. IV, § 7, 54 Stat. 1234, 1235-36 (1940).

[16] *See* Federal Aviation Act of 1958, Pub.L. No. 85-726, 72 Stat. 731 (1958); *see also* Department of Transportation Act, Pub.L. No. 89-670, §§ 3(e)(1), 6(c)(1), 80 Stat. 931, 932, 938 (1966) (renaming the Federal Aviation Agency).

[17] *See, e.g.*, ICC Termination Act of 1995, Pub.L. No. 104-88, 109 Stat. 803 (1995); Staggers Rail Act of 1980, Pub.L. No. 96-448, 94 Stat. 1895 (1980); Motor Carrier Act of 1980, Pub.L. No. 96-296, 94 Stat. 793 (1980); *see also* Dempsey, *supra*, at 327-66 (discussing deregulation of the various transportation industries).

[18] *See* Airline Deregulation Act of 1978, Pub.L. No. 95-504, 92 Stat. 1705 (1978) (codified in scattered sections of 49 U.S.C.).

"enact[ing] or enforc[ing] any law . . . relating to rates, routes, or services of any air carrier."[19]

In the 1994 FAAAA, Congress extended the Airline Deregulation Act's preemption provision to prohibit state regulation of air/ground carriers as well. It also added a new provision preempting state regulation of motor carriers of property.[20] In the same language used in the Airline Deregulation Act's preemption provision, the FAAAA preemption provisions broadly prohibit states from "enact[ing] or enforc[ing] a law, regulation, or other provision having the force and effect of law related to a price, route, or service" of a motor carrier, air carrier or air/ground carrier of property.

In enacting the FAAAA preemption provisions, Congress exercised its authority under the Interstate Commerce Clause to ease the burden intrastate regulation imposed on interstate commerce.[21] Congress believed that the need for preemption of state authority arose out of a

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[19] *Id.* § 105(a); *see Morales*, 504 U.S. at 378-79, 112 S. Ct. 2031; *see also New England Legal Found. v. Mass. Port. Auth.*, 883 F.2d 157, 172-73 (1st Cir. 1989) ("In reducing federal economic regulation of the field [with the Airline Deregulation Act of 1978] . . . , Congress obviously did not intend to leave a vacuum to be filled by the Balkanizing forces of state and local regulation."). Congress initially codified this preemption provision at 49 U.S.C.App. § 1305(a)(1), then amended and recodified it at its current location, 49 U.S.C. § 41713(b)(1), in Pub.L. No. 103-272, ch. 417, 108 Stat. 745 (1994).

[20] *See* Federal Aviation Administration Authorization Act of 1994, Pub.L. No. 103-305. Section 601(b) of the FAAAA is the air/ground carrier provision, codified at 49 U.S.C. § 41713(b)(4)(A). Section 601(c) is the motor carrier provision, which was recodified as amended at its current location, 49 U.S.C. § 14501(c)(1), in Pub.L. No. 104-88, ch. 145, 109 Stat. 803 (1995).

[21] *See* FAAAA, Pub.L. No. 103-305, § 601(a) (findings).

"patchwork of [state] regulation" of transportation, which created "a huge problem for national and regional carriers attempting to conduct a standard way of doing business." It believed that intrastate regulation also resulted in higher rates for intrastate shipments. Congress designed the preemption provisions to eliminate diverse state regulations (such as regulation of entry, tariffs, prices and types of commodities carried), and promote uniform standards for air, air/ground and motor carriers engaged in the transportation of property.[22]

(B) Federal Contraband Cigarette Law

Although Congress has limited state regulation over the transportation of goods, Congress has also expressly recognized the power of the states to regulate and confiscate contraband cigarettes (cigarettes on which state taxes have not been paid). In 1978, Congress stated in the Contraband Cigarette Trafficking Act that federal regulation of contraband cigarettes does not "affect the concurrent jurisdiction of a State to enact and enforce cigarette tax laws, to provide for the confiscation of cigarettes and other property seized for violation of such laws, and to provide for penalties for the violation of such laws."[23] Congress included this provision because "[t]he major responsibility for enforcing state cigarette tax laws is now and must continue to be the burden of the states."[24]

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[22] H.R.Rep. No. 103-677, at 86-88 (1994), *reprinted in* 1994 U.S.C.C.A.N. 1715, 1758-60.

[23] 18 U.S.C. § 2345(a).

[24] H.R. Rep. 95-1778, at 13 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5535, 5541.

(C) Maine's Tobacco Delivery Law

The Maine Legislature enacted the Tobacco Delivery Law to "clarif[y] the collection of taxes with regard to the delivery sales of cigarettes" and "to strengthen the regulation of delivery sales of cigarettes, especially with regards to preventing sales to minors."[25] When the Maine Legislature enacted the law in 2003, its Health and Human Services Committee considered testimony that nearly 25% of Maine's high school students smoke occasionally and 14% smoke on a regular basis.[26] The bill's sponsor informed the Health and Human Services Committee that delivery sales via the internet increased minors' access to tobacco by giving them an opportunity to purchase tobacco without having to verify their age. He also stated that out-of-state retailers advertise and sell tobacco products tax-free, thereby increasing the tobacco delivery sales through the mail and the internet and costing the State lost tax revenue.[27]

The Tobacco Delivery Law is one of many steps that Maine has taken to restrict underage access to tobacco. When considering the Tobacco Delivery Law, the Legislature heard testimony about Maine's "comprehensive program on youth smoking," which "includes education on

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[25] L.D. 1236, Summary for the Original Legislative Document (121st Me.Legis.2003).

[26] *See* Committee File of the Committee on Health and Human Services on L.D. 1236, "An Act To Regulate the Delivery Sales of Cigarettes and To Prevent the Sale of Cigarettes to Minors" (April 29, 2003), Testimony of the Maine Coalition on Smoking or Health. This testimony is the written testimony submitted at the time of the public hearing held by the committee assigned the bill. There is no record of the oral testimony presented at these hearings.

[27] *See id.*, Testimony of Representative Glenn Cummings.

tobacco, increases in the price of cigarettes through [an] excise tax, . . . programs to help youth who smoke and want to quit" and "tough laws regarding access."[28] According to repeated testimony, this comprehensive approach contributed to a decline in smoking by Maine high school students.[29]

Increasing internet sales have frustrated the State's laudable and extensive efforts to restrict underage access to tobacco. The Maine Tobacco Delivery Law addresses this problem by requiring: that delivery services check for packages marked as containing tobacco and confirm that those packages are being sent by a Maine-licensed tobacco distributor or retailer; that tobacco retailers tell their delivery service (such as UPS or the other members of the carrier associations) the age of any tobacco-product purchaser; and that tobacco retailers use for tobacco-product delivery only a delivery service that agrees to request age identification from and deliver to the specific addressee.[30]

(D) Other States' Tobacco Delivery Laws

Other states recently have passed statutes regulating the delivery of tobacco products.[31] Although these state

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[28] *Id.*, Testimony of the Maine Coalition on Smoking or Health.

[29] *See, e.g., id.; id.*, Testimony of Dora Anne Mills, Director, Bureau of Health, Department of Human Services ("As a result of these efforts, Maine's tobacco addiction rates have plummeted among youth – from nearly 40% of Maine high school students being . . . smokers in 1997 to 25% in 2001. This 36% decline is one of the largest declines seen across the country.").

[30] *See* 22 M.R.S.A. §§ 1555-C(3)(A), (C), 1555-D.

[31] *See, e.g.*, Ariz.Rev.Stat. §§ 42-3221 to 3230 (enacted in 2004); Conn. Gen.Stat. § 12-285c (enacted in 2003); Okla. Stat. tit. 68, § 317.4 (enacted in 2003); Wash Rev.Code § 70.155.105 (enacted in 2003). The

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tobacco delivery laws involve similar limitations on tobacco shipments, the specific requirements vary by state.

For example, while state limitations on tobacco shipments often depend on whether a retailer shipping or receiving the package is licensed, the licensing is state-specific. Thus, for each tobacco shipment, an interstate delivery service must determine whether the addressee is located in a state that has such a limitation, then consult a list of licensed retailers provided by that state to determine if the delivery is lawful.[32]

Many states require that tobacco retailers use a delivery service that will confirm the addressee's age and deliver only to an adult.[33] But while some states require that the addressee sign personally for the package, others allow any adult to sign. States also vary in their requirements for checking the identification of the person signing for the package.[34]

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associations cite many of these statutes in paragraphs 100 to 158 of their Statement of Material Facts. The Attorney General qualifies and moves to strike all of these paragraphs. Def.'s Responsive SMF ¶¶ 100-158. I consider these state statutes as relevant law, not facts.

[32] *See, e.g.*, Alaska Stat. § 43.50.105(c); Conn. Gen.Stat. § 12-285c(a); 22 M.R.S.A. § 1555-D; N.Y. Pub. Health Law §§ 1399-*ll* (1)-(2).

[33] *See, e.g.*, Ariz.Rev.Stat. § 42-3225(A)(2); Conn. Gen.Stat. § 12-285c(c); Del Code Ann. tit. 30, § 5365(a)(2); 22 M.R.S.A. § 1555-C(3)(C); Or.Rev.Stat. § 323.718(1)(b)(A).

[34] *Compare* Ariz.Rev.Stat. § 42-3225(2) (addressee or adult residing at the same address must sign and identification is required if the signer appears to be under twenty-seven) *with* Conn. Gen.Stat. § 12-285c(c) (customer receiving the delivery must provide proof of age) *and* 22 M.R.S.A. §§ 1555-C(3)(C)(2) to (3) (addressee must sign and identification is required if the addressee is under twenty-seven).

Although many of these state laws require the retailer to mark the package to reveal that it contains tobacco, the required location and content of the marking may differ.[35] The type of tobacco regulated also varies from state to state. Some statutes regulate only cigarettes, while others cover a broad range of tobacco products.[36]

III. ANALYSIS

The carrier associations attack Maine's Tobacco Delivery Law on the basis that the FAAAA expressly preempts state regulation that relates to a carrier's services.[37] According to Article VI of the United States Constitution, federal statutes enacted under constitutional authority are "the supreme Law of the Land; . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." The FAAAA, enacted under Congress's constitutional authority to regulate interstate

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[35] *Compare* Del Code Ann. tit. 30, § 5365(a)(1) (shipping documents must include a clear and conspicuous statement that Delaware law prohibits shipping tobacco to minors and requires the payment of applicable taxes) *with* 22 M.R.S.A. § 1555-C(3)(B); 10-144 Code Me. R. Ch. 203, §§ 10(C)(2) (marking must be on the outside of the package and, at a minimum, on the same plane as the shipping label, and must show that tobacco products are inside and list the retailer's name and Maine license number) *and* Nev.Rev.Stat. § 202.24935(3) (packaging or wrapping must be clearly marked "cigarettes" or "tobacco products").

[36] *Compare* Alaska Stat. § 43.50.105 (cigarettes) *and* Conn. Gen.Stat. § 12-285c (cigarettes) with 22 M.R.S.A. §§ 1551(3), 1555-C, 1555-D (any form of tobacco and any material or device used for smoking, chewing or other tobacco consumption) and Nev.Rev.Stat. § 202.24935(1) ("cigarettes, cigarette paper, tobacco of any description or products made from tobacco").

[37] They also argue preemption based on prices and routes, but I find it necessary to address only service(s). Since the associations have argued only express preemption, I do not consider implied preemption.

commerce, prohibits states from enacting laws "related to a . . . service of" an air carrier, air/ground carrier or motor carrier "with respect to the transportation of property."[38] Congress has specified some areas that are exempt from preemption, but the Maine Tobacco Delivery Law fits none of the exemptions.[39] Therefore, the associations argue, the

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[38] *See* 49 U.S.C. §§ 14501(c)(1), 41713(b)(4)(A). 49 U.S.C. § 14501(c)(1) is the motor carrier provision. It provides that a state:

> may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of any *motor carrier* (other than a carrier affiliated with a direct air carrier covered by section 41713(b)(4)) or any motor private carrier, broker, or freight forwarder with respect to the transportation of property.

(Emphasis added.). 49 U.S.C. § 41713(b)(4)(A) is the air and air/ground carrier provision. In very similar language, it provides that a state

> may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service *of an air carrier or carrier affiliated with a direct air carrier through common controlling ownership* when such carrier is transporting property by aircraft or by motor vehicle (whether or not such property has had or will have a prior or subsequent air movement).

(Emphasis added). Congress intended that these "identical" provisions "function in the exact same manner with respect to [their] preemptive effects." H.R.Rep. No. 103-677, at 85, *reprinted in* 1994 U.S.C.C.A.N. at 1757. Both provisions apply here because the associations include ground carriers as well as air/ground carriers. (UPS is covered by the air/ground carrier provision because one of its operating entities is an air carrier. Pls.' SMF, Def.'s Responsive SMF ¶ 5.)

[39] Savings clauses in the preemption provisions permit states to regulate safety with respect to motor vehicles, highway route controls or limitations based on vehicle size, weight or cargo hazards, financial responsibility relating to insurance, household goods transportation, and tow truck pricing for service provided without the towed-vehicle owner's or operator's consent. 49 U.S.C. §§ 14501(c)(2), 41713(b)(4)(B).

The safety exception, 49 U.S.C. §§ 14501(c)(2)(A), 41713(b)(4)(B)(i), does not exempt Maine's Tobacco Delivery Law from preemption because the exception applies only to state regulation of motor vehicle

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FAAAA preempts the challenged provisions of the Maine Tobacco Delivery Law.

Congress enlarged the Airline Deregulation Act preemption provisions to include motor carriers and air/ground carriers because it wanted to level the playing field between deregulated air carriers, carriers that are affiliated with an air carrier but not otherwise covered by the Airline Deregulation Act, and motor carriers not affiliated with an air carrier. *Id.* at 82, 87, *reprinted in* 1994 U.S.C.C.A.N. at 1754, 1759. The preemption is not limited to interstate transportation. *See* FAAAA, Pub.L. No. 103-305, § 601(a) (finding that "the regulation of *intrastate transportation* of property by the States has – (A) imposed an unreasonable burden on interstate commerce; (B) impeded the free flow of trade, traffic, and transportation of interstate commerce; and (C) placed an unreasonable cost on the American consumers") (emphasis added); *N.Y. State Motor Truck Ass'n,* 2004 WL 2937803, at *4 ("The FAAAA, with a few minor exceptions, effectively preempts state regulations of intrastate motor carrier activities.").

Given the deadly health consequences, there are no persuasive arguments for allowing minors to have tobacco products. Thus, it is hard to believe that, if Congress were confronted now with the specific question whether Maine should be able to take steps to protect the health of its

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safety, and does not preserve the states' general authority over safety issues. *See United Parcel Serv., Inc. v. Flores-Galarza* ("*UPS II*"), 385 F.3d 9, 13-14 (1st Cir.2004). The exception for the transportation of household goods, 49 U.S.C. §§ 14501(c)(2)(B), 41713(b)(4)(B)(ii), also does not apply because it refers to state regulation of the services of moving companies. *See UPS II,* 385 F.3d at 14.

children, Congress would vote to prohibit what Maine is trying to do. But the federal legislation that I must interpret comes from a congressional push to deregulate airlines and motor carriers generally, without regard for the topic or goal of the preempted state regulation (other than the few, irrelevant, specified exceptions). At the time, Congress believed that state regulation was interfering with ordinary market forces, driving up the price of service and hindering competition.[40] To avoid that state interference, Congress enacted preemption legislation that speaks in general categories. To interpret the scope of the resulting federal preemption, I must "look to Congress's intent, which is revealed in the language of the provision, as well as the structure and purpose of the statute."[41]

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[40] *See* FAAAA, Pub.L. No. 103-305, § 601(a).

[41] *United Parcel Serv., Inc. v. Flores-Galarza* (*"UPS I"*), 318 F.3d 323, 334 (1st Cir.2003). The Supreme Court has provided several guideposts for approaching the issue of federal preemption:

> (1) An express congressional definition of what is preempted "supports a reasonable inference ... that Congress did not intend to pre-empt other matters." *Freightliner Corp. v. Myrick*, 514 U.S. 280, 288, 115 S. Ct. 1483, 131 L. Ed. 2d 385 (1995);
>
> (2) Congressional purpose is the "ultimate touchstone." *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516, 112 S. Ct. 2608, 120 L. Ed. 2d 407 (1992) (internal quotation omitted);
>
> (3) If the federal statute would "bar state action in a field of traditional state regulation," a court must "work on the assumption that the historic police powers of the States are not to be superseded by the Federal Act unless that is the clear and manifest purpose of Congress." *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 541-42, 121 S. Ct. 2404, 150 L. Ed. 2d 532 (2001) (citations and internal quotation omitted);

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(4) This "assumption" (elsewhere called a "presumption," *see Pharm. Research & Mfrs. of Am. v. Walsh*, 538 U.S. 644, 666, 123 S. Ct. 1855, 155 L. Ed. 2d 889 (2003); *UPS I*, 318 F.3d at 336) disappears when a state legislates in a field with "a history of significant federal presence." *United States v. Locke*, 529 U.S. 89, 108, 120 S. Ct. 1135, 146 L. Ed. 2d 69 (2000).

Ultimately the analysis here hinges on the second factor, congressional purpose.

The parties have not argued that the first factor helps resolve this case.

They have spent a good deal of energy on the third and fourth factors. I conclude that I erred in my analysis in my earlier decision on the associations' facial motion for summary judgment, where I applied the presumption against preemption by viewing the field narrowly as "ground transport or delivery of dangerous products, especially to minors in order to protect their health." I noted there that the First Circuit in *UPS I* made much of the long federal presence in air transportation (which I distinguished from the history in ground transportation). *See N.H. Motor I*, 301 F.Supp.2d at 44. But I observe now that I cannot make this distinction, because the purpose of the FAAAA's preemption provisions was to even the playing field for air and ground transportation. *See* H.R.Rep. No. 103-677, at 82, *reprinted in* 1994 U.S.C.C.A.N. at 1754. More importantly, in determining whether there is a presumption against federal preemption, the focus is to be on the field where *Congress* legislates. ("Th[e] presumption [against preemption] only arises . . . if Congress legislates in a field traditionally occupied by the states." *UPS I*, 318 F.3d at 336 (citing *Locke*, 529 U.S. at 108, 120 S. Ct. 1135).) I therefore adopt the approach taken in *UPS I* and do not apply the presumption against preemption. *But see Ward v. New York*, 291 F.Supp.2d 188, 209-10 (W.D.N.Y.2003) (distinguishing *UPS I* and applying a presumption against preemption because New York's tobacco delivery law was "a public health law of general application").

Since both sides argued explicitly on this motion whether I should apply the presumption against preemption, there is no unfairness in my making this correction and no longer applying the presumption. *See* Pls.' "As Applied" Mot. for Summ. J. at 10-13; Def.'s Opp'n at 9-12; Def.'s Mot. for Summ. J. at 8. Even if I continued to apply the presumption, I would find Maine's Tobacco Delivery Law preempted for the reasons stated in text.

I turn therefore to the statutory language. The preemption provisions broadly prohibit states from enacting a law "related to a price, route, or service" of an air carrier, air/ground carrier or motor carrier "with respect to the transportation of property."[42] I deal with the significant terms in reverse order.

(A) "With respect to the transportation of property"

The Maine statute deals with the transportation (here, the delivery) of property, namely, tobacco products.[43]

(B) "Service"

Two Supreme Court cases have interpreted the Airline Deregulation Act's preemption provision (the statutory predecessor to the FAAAA preemption provisions). The Airline Deregulation Act provision that these cases interpret is very similar to both of the FAAAA preemption provisions and uses the term "services."[44] Unfortunately,

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[42] 49 U.S.C. §§ 14501(c)(1), 41713(b)(4)(A).

[43] The language "with respect to the transportation of property" comes from the motor carrier provision, 49 U.S.C. § 14501(c)(1). The provision for air carriers and air/ground carriers, 49 U.S.C. § 41713(b)(4)(A), has slightly different language. This provision prohibits state regulation of "an air carrier or carrier affiliated with a direct air carrier . . . *when such carrier is transporting property by aircraft or motor vehicle* (whether or not such property has had or will have a prior or subsequent air movement)." (Emphasis added). Under this provision, the Maine statute regulates a motor carrier affiliated with a direct air carrier when the motor carrier is transporting (delivering) property (tobacco products) by motor vehicle.

[44] These cases interpret the original Airline Deregulation Act provision, which provided that no state "shall enact or enforce any law,

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these Supreme Court cases do not shed much light on the term "services" or "service." In one case, the state statutes regulated the advertising of airfares. Since the federal statute expressly prohibited state regulation that relates to rates (fares), the Supreme Court had no need to consider or define the term "services."[45] The other case concerned frequent flyer miles; the Supreme Court observed summarily that frequent flyer miles relate both "to 'rates,' *i.e.*, [the airline]'s charges in the form of mileage credits for free tickets and upgrades, and to 'services,' *i.e.*, access to flights and class-of-service upgrades." It did not elaborate further on the meaning of the term "services," although it did reject an attempt to separate "matters 'essential' from matters unessential to airline operations" in analyzing what is preempted.[46]

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rule, regulation, standard, or other provision having the force and effect of law relating to rates, routes, or services of any air carrier having authority under title IV of this Act . . . to provide air transportation." 49 U.S.C.App. § 1305(a)(1) (1993). In 1994, Congress amended this preemption provision to include its current language (the same language used in the FAAAA provisions), which provides that a state may not "enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier." *See* Pub.L. No. 103-272, ch. 417, 108 Stat. 745 (July 5, 1994) (also recodifying the provision at its current location, 49 U.S.C. § 41713(b)(1)). Congress did not intend the amendment to make any substantive change, *see id.; Wolens*, 513 U.S. at 223 n.1, 115 S. Ct. 817, and the parties have not cited any cases suggesting a different definition for the term "service" under the FAAAA than that used for the term "services" under the original Airline Deregulation Act provision.

[45] *Morales*, 504 U.S. at 379-80, 112 S. Ct. 2031. The Court in *Morales* instead addressed the meaning of the phrase "relating to," as discussed below. 504 U.S. at 383-91, 112 S. Ct. 2031.

[46] *Wolens*, 513 U.S. at 226, 115 S. Ct. 817. *Wolens* considered the meaning of the language "enact or enforce any law" as it related to the common law of contracts. *See id.* at 228-29, 115 S. Ct. 817.

Lower courts, on the other hand, have struggled with the scope of the "services" preemption in the Airline Deregulation Act, particularly in determining whether federal law preempts state tort law for accidents that happen on board an aircraft.[47] These courts have limited the preempting term "service" to the frequency and scheduling of transportation and the choice of starting and ending points;[48] or have defined "services" as bargained-for

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[47] In *Charas v. Trans World Airlines, Inc.*, 160 F.3d 1259, 1265-66 (9th Cir. 1998), the Ninth Circuit held that the Airline Deregulation Act did not preempt state negligence and breach of contract claims because "service" referred to "the provision of air transportation to and from various markets at various times," not the provision of amenities such as personal assistance, luggage handling, and food and drink. The Eleventh Circuit has held that a state claim of age discrimination in employment is not preempted because it does not relate to an airline's services, but that claims relating to the physical capabilities of flight personnel could relate to services and thus be preempted. *Parise v. Delta Airlines, Inc.*, 141 F.3d 1463, 1466-68 (11th Cir. 1998). Courts have also held that a state defamation claim had too tenuous a connection with services (ticketing) to be preempted, *Taj Mahal Travel, Inc. v. Delta Airlines, Inc.*, 164 F.3d 186, 195 (3d Cir. 1998), but that a plaintiff's claim for conversion for a carrier's failure to deliver the contents of a package related to the carrier's services and was thus preempted, *Forman v. Fed. Express Corp.*, 194 Misc.2d 441, 753 N.Y.S.2d 348, 351-52 (2003). The Fifth Circuit held that a state tort claim for personal injury was not preempted because it related to the operation of the aircraft, not its services. *Hodges v. Delta Airlines, Inc.*, 44 F.3d 334, 340 (5th Cir. 1995). The court in *Trujillo v. American Airlines, Inc.*, 938 F.Supp. 392, 394 (N.D. Tex. 1995), applied this services/operations distinction, holding that negligence and consumer protection claims for the airline's preparation and shipping of a package were preempted because they involved services, not operations of the airline.

Some of these cases interpret the term "services" in the original Airline Deregulation Act preemption provision, 49 U.S.C.App. § 1305(a)(1), and others interpret the term "service" in the amended provision, 49 U.S.C. § 41713(b)(1), depending on which version was in effect.

[48] *Charas*, 160 F.3d at 1265-66.

provisions (preempted) distinct from "operations or maintenance" (not preempted).[49] The Third Circuit, on the other hand, has concluded that the services/operations distinction is "strained and unsatisfactory," and that to define the term service, "focusing on the competitive forces of the market . . . leads to a more accurate assessment of Congressional intent."[50]

The First Circuit has not entered this debate over the meaning of the word "services" in the Airline Deregulation Act.[51] But without discussing the ambiguities of the term, the First Circuit has said that the word "service," as used in the FAAAA's air and air/ground carrier provision, includes "the delivery of packages on an express or time-guaranteed basis."[52] In that case, the First Circuit characterized UPS's delivery services as depending on the "orderly flow of packages." It also quoted approvingly a Ninth Circuit statement that "[t]erms of service determine cost. To regulate them is to affect the price."[53]

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[49] *Hodges*, 44 F.3d at 336-37, 338-39.

[50] *Taj Mahal*, 164 F.3d at 194.

[51] *See French v. Pan Am Express, Inc.*, 869 F.2d 1, 3 (1st Cir.1989) (declining to address express preemption based on the Airline Deregulation Act's reference to "services" where the comprehensive federal legal scheme set out in the rest of the Airline Deregulation Act impliedly preempted the plaintiff's state claim).

[52] *UPS I*, 318 F.3d at 336 (interpreting 49 U.S.C. § 41713(b)(4)(A)).

[53] *Id.* (quoting *Fed. Express Corp. v. Cal. Pub. Utils. Comm'n*, 936 F.2d 1075, 1078 (9th Cir. 1991)). Price is another preempted area of regulation. 49 U.S.C. §§ 14501(c)(1), 41713(b)(4)(A) (prohibiting states from enacting or enforcing a law "related to a price, route, or service" of a carrier). The Fifth Circuit has interpreted the term "price," holding that a negligence claim for failure to provide more leg room to prevent the health condition of deep vein thrombosis related to price because providing more leg room would reduce the number of seats and affect

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I follow the First Circuit decision. The Maine statute here deals with the delivery of packages and, in its application to UPS, affects delivery on an express or time-guaranteed basis. UPS has a national and international distribution system that relies heavily on uniform procedures for picking up, documenting, processing, handling and delivering packages. The record establishes that to comply with the Maine statute, UPS must use delivery practices for Maine packages that vary from its nationally and internationally uniform procedures.[54] This lack of uniformity affects the price of UPS's services and interferes with the orderly flow of packages by jeopardizing the

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the prices the airline charged. *Witty v. Delta Air Lines, Inc.*, 366 F.3d 380, 383 (5th Cir. 2004).

[54] Pls.' SMF, Def.'s Responsive SMF ¶¶ 7, 9, 18, 20, 24, 26, 30-31, 60-67. The Attorney General admitted paragraphs 7, 9, 18, 26, 30, 31 and 60 through 67 of the associations' Statement of Material Facts.

He responded "qualified" to the associations' paragraph 20, which states that UPS preloaders must scan the exterior of every package to be delivered in Maine for a marking indicating the package contains tobacco products. The Attorney General responded that "[p]reloaders are already inspecting packages for markings," but did not deny that it takes the preloaders *more time* to check the package for the marking required by the Maine statute, *see* 10-144 Code Me. R. Ch. 203, §§ 10(C)(2), 11; *see also* footnote 67 (discussing what a carrier must do to comply with these regulations).

In response to paragraph 24, which states that the preloaders do not usually read the shipper's name and only occasionally read the addressee's name, and that having to do so because of the Maine statute delays the preloaders' tasks, the Attorney General stated, "Qualified. UPS has done no operational study to ascertain whether there is such a delay or, if so, the magnitude of that delay." The Attorney General does not deny that the preloaders usually do not check for the shipper's or the addressee's name, or that having to do so causes delay. There is no need for an operational study because it is logical that checking these names would cause some delay, however slight.

speed, reliability and efficiency of delivery.[55] Under First Circuit precedent, therefore, the Maine statute has some effect on a carrier's "services."

(C) "Related to"

In *Morales,* the Supreme Court determined the meaning of the phrase "relating to" in the Airline Deregulation Act.[56] The Court recognized that the phrase has a broad scope both in ordinary language and in the statute. It ruled that the relationship can be satisfied in either of two ways: if the state law: (a) expressly references the carrier's prices, routes or services or (b) has a "forbidden significant effect upon" the carrier's prices, routes or services.[57] I see no reason to interpret the FAAAA phrase, "related to," any differently. Indeed, the legislative history makes clear that the drafters intended the same meaning,[58] and the First Circuit has made it the law of this

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[55] *See* Pls.' SMF, Def.'s Responsive SMF ¶¶ 7-8, 10-11. The Attorney General admitted paragraphs 7, 8 and 10, but responded "qualified" to the associations' paragraph 11. Paragraph 11 states that UPS must avoid even minor delays to meet its delivery deadlines, and that "delays or disruptions at any point in UPS's operations can affect thousands of packages in transit." The Attorney General responded that UPS's time projections are based on historical data, which inherently include delays associated with non-deliverable packages, and that a number of factors can delay UPS's services. But the Attorney General did not deny that delays affect delivery deadlines, and, logically, the fact that UPS already encounters delays does not mean additional delay is acceptable.

[56] 504 U.S. at 383-89, 112 S. Ct. 2031.

[57] *Id.* at 388, 112 S. Ct. 2031; *see also UPS I*, 318 F.3d at 335 (citing *Morales*, 504 U.S. at 388, 112 S. Ct. 2031).

[58] According to the FAAAA's legislative history:

> In substituting the word "related" for the prior word "relating" . . . we are intending no substantive change to the previously enacted preemption provision in Section 105 of the

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circuit that the *Morales* interpretation controls the FAAAA as well.[59] I will address each of the three challenged Maine provisions for whether they satisfy either or both or these two requirements.

> Federal Aviation Act and do not intend to impair the applicability of prior judicial case law interpreting these provisions. In particular, the conferees do not intend to alter the broad preemption interpretation adopted by the United States Supreme Court in *Morales v. Trans World Airlines, Inc.* . . .

H.R.Rep. No. 103-677, at 83, *reprinted in* 1994 U.S.C.C.A.N. at 1755.

[59] *UPS I*, 318 F.3d at 334-35. In interpreting the Airline Deregulation Act preemption provision, the Court in *Morales* considered a similar ERISA preemption provision, 29 U.S.C. § 1144(a). 504 U.S. at 383-85, 112 S. Ct. 2031. The ERISA provision preempts state laws "insofar as they . . . relate to any employee benefit plan." 29 U.S.C. § 1144(a); *Morales*, 504 U.S. at 383, 112 S. Ct. 2031. At the time of *Morales*, under the ERISA provision a law "relate[d] to" an employee benefit plan "if it had a connection with, or reference to, such a plan." *Morales*, 504 U.S. at 384, 112 S. Ct. 2031 (internal quotation omitted). The Supreme Court later limited the meaning of "relate to" in the ERISA provision, stating that courts should consider the objectives of the ERISA statute rather than look to "infinite relations" or "infinite connections" to measure preemption, and noting that ERISA preempts state laws that "mandate[] employee benefit structures or their administration." *N.Y. State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 656-58, 115 S. Ct. 1671, 131 L. Ed. 2d 695 (1995); *see also Catholic Charities of Me., Inc. v. City of Portland*, 304 F.Supp.2d 77, 90-92 (D.Me.2004) (discussing this cutback in the ERISA meaning of "relate to"). Despite the Supreme Court's narrowing of the ERISA meaning of "relate to," Congress intended the *Morales* Court's broad interpretation of "relating to" in the Airline Deregulation Act to apply to the FAAAA preemption provisions. *See* H.R.Rep. No. 103-677, at 83, *reprinted in* 1994 U.S.C.C.A.N. at 1755; *see also UPS I*, 318 F.3d at 335 n.19 ("[I]f developments in pension law have undercut holdings in air-transportation law, it is for the Supreme Court itself to make the adjustment. Our marching orders are clear: follow decisions until the Supreme Court overrules them.") (quoting *United Airlines, Inc. v. Mesa Airlines, Inc.*, 219 F.3d 605, 608 (7th Cir. 2000)) (alteration in original).

(1) Section 1555-D

One of the three challenged provisions of the Maine statute expressly references carriers' services. Specifically, section 1555-D states: "A person may not knowingly transport or cause to be delivered to a person in this State a tobacco product purchased from a person who is not licensed as a tobacco retailer in this State."[60] Although this prohibition uses the general language "a person" (rather than "a delivery service" or "a carrier"), it expressly references the service that carriers provide (the transportation of property). Carriers that violate this prohibition face penalties under section 1555-D(2). Moreover, to achieve compliance, subsection 1555-D(1) requires the Attorney General to provide lists of licensed tobacco retailers and known unlicensed retailers to "a delivery service." "Delivery service" is defined as "a person, including the United States Postal Service, who is engaged in the commercial delivery of letters, packages, or other containers."[61] A "delivery service" under the Maine statute that uses motor vehicle transportation fits within the

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[60] In full, the preamble reads:

> A person may not knowingly transport or cause to be delivered to a person in this State a tobacco product purchased from a person who is not licensed as a tobacco retailer in this State, except that this provision does not apply to the transportation or delivery of tobacco products to a licensed tobacco distributor or tobacco retailer. A person is deemed to know that a package contains a tobacco product if the package is marked in accordance with the requirements of section 1555-C, subsection 3, paragraph B or if the person receives the package from a person listed as an unlicensed tobacco retailer by the Attorney General under this section.

22 M.R.S.A. § 1555-D.

[61] *Id.* § 1551(1-C).

FAAAA's definition of "motor carrier" ("a person providing motor vehicle transportation for compensation").[62] Section 1555-D thus expressly references carriers' services. Under the analysis of *Morales* and *UPS I*, that is enough to result in preemption.

This conclusion differs from what I said in my preliminary rulings.[63] My conclusion has changed because I no longer apply the presumption against preemption,[64] and because, since my previous rulings, I have had the opportunity for further thought and reflection, as well as the benefit of the First Circuit's decision in *UPS II*, which sheds additional light on the issue of preemption under the FAAAA. I follow the plain language of the statute and the First Circuit authority in *UPS I* and *UPS II* in concluding that section 1555-D expressly references carriers' services.[65]

Even if it did not make the express reference, section 1555-D would be preempted because, under the other *Morales/UPS I* standard for preemption, it also has a forbidden significant effect on carriers' services. Section 1555-D prohibits carriers from delivering tobacco products

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[62] 49 U.S.C. § 13102(12). The FAAAA does not define the term "carrier," used in the air/ground provision, 49 U.S.C. § 41713(b)(4)(A) (preempting state regulation of "any air carrier or carrier affiliated with a direct air carrier").

[63] *N.H. Motor II*, 324 F.Supp.2d at 234; *N.H. Motor I*, 301 F.Supp.2d at 43-46.

[64] *See* footnote 41.

[65] There is no unfairness to the parties in altering my conclusion since both parties argued the matter on these new motions. *See* Pls.' "As Applied" Mot. for Summ. J. at 22-23; Def.'s Opp'n at 9 (arguments on facial preemption); footnote 41 (citing the parties' arguments on these motions on the presumption against preemption).

in Maine if they have been purchased from an unlicensed retailer, unless the delivery is to a licensed tobacco distributor or retailer. The carrier must thus consult the Maine Attorney General's lists of Maine-licensed and known unlicensed tobacco retailers before delivering packages containing tobacco products.[66]

For a carrier to comply with section 1555-D, it (in the case of UPS, its preloaders who load the package cars for deliveries) must examine every package it receives with a Maine destination address to try to determine if the package contains tobacco products. It can do this either by looking for the required marking,[67] or by reading the names of the addressee and the shipper for some indication that the package contains tobacco products.[68] If the package is marked or if the name of the addressee or shipper indicates tobacco products, the carrier must next research whether the addressee is a tobacco retailer or

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[66] *See* 22 M.R.S.A. § 1555-D(1). (The carrier is presumed to know that a package contains a tobacco product if it is from a listed unlicensed retailer or if it is marked by the retailer, as required in section 1555-C(3)(B), with the name and Maine license number of the retailer and an indication that the contents are tobacco products. *Id.* § 1555-D.)

[67] The regulations for the Maine Tobacco Delivery Law attempt to ease examination by requiring that the marking "shall, at a minimum, appear on the same plane of the package as the shipping label that identifies the delivery address." *See* 10-144 Code Me. R. Ch. 203, §§ 10(C)(2). A carrier "is deemed to know that a package contains a tobacco product" if it is marked in this way. *Id.* § 11. But the carrier is protected, *i.e.*, "deemed *not to know* that a package contains tobacco," only if the marking appears only on the plane opposite the shipping label (the bottom of the package). *Id.* This means that a carrier will be presumed to know the package's contents if the marking is on the top of the box, and may be found to know the contents if the marking appears on any side other than the top or the bottom.

[68] Pls.' SMF, Def.'s Responsive SMF ¶¶ 18, 20, 23, 33, 94-96.

distributor licensed in Maine (and thus able to receive any package containing tobacco products, whether shipped from a licensed or unlicensed retailer). For UPS, this results in the package being removed from the usual delivery procedures.[69] If the addressee is not a licensed tobacco retailer or distributor, UPS arranges to have the package returned to the shipper. If the shipper is located in Maine, UPS must contact the shipper to retrieve the package (because returning it to the shipper would itself violate section 1555-D).[70]

In *UPS II*, the First Circuit held that a Puerto Rico statute "impermissibly affected UPS's prices, routes, and services in part because it required UPS to identify the contents of the packages (a deviation from standard procedures used for deliveries elsewhere in the United States)."[71] Section 1555-D of the Maine statute requires carriers to attempt to identify a package's contents, causing UPS to use procedures for packages in Maine that differ from its nationally uniform procedures. This departure from UPS's uniform procedures delays the delivery process.[72] Having to identify, separate and, if necessary,

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[69] *See* Pls.' SMF, Def.'s Responsive SMF ¶ 26.

[70] Pls.' SMF, Def.'s Responsive SMF ¶¶ 30-31.

[71] 385 F.3d at 14.

[72] Pls.' SMF, Def.'s Responsive SMF ¶¶ 20, 24, 26. The Attorney General often qualifies or denies the associations' statements that the changed procedures cause delay, claiming that the associations have not done any operational or time study to prove the delay. *See, e.g.*, Def.'s Responsive SMF ¶ 24, 29. I conclude that there is no need for empirical studies to prove that a change in the normal, uniform procedure, such as removing the package from the delivery process to research the addressee, Pls.' SMF ¶¶ 26-29, would cause a delay in the process. The First Circuit did not require such data to prove an impact on the

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contact the shipper to retrieve a package containing tobacco products is at least as burdensome as the impermissible requirement in *UPS I* that UPS obtain a certificate of excise tax payment from the recipient of a parcel.[73]

The summary judgment record therefore shows that, as in *UPS I*, compliance with section 1555-D significantly affects UPS's services by interrupting the orderly flow of packages and interfering with the timeliness and effectiveness of UPS's service.[74] I cannot successfully distinguish the effects of section 1555-D from the effects of the Puerto Rico statute in *UPS I* and *UPS II*.[75] It is true that

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express or on-time delivery of packages in *UPS I*, 318 F.3d at 334-36. *See also* footnote 92 (addressing the need for empirical data).

[73] *See* 318 F.3d at 326, 327 n.3.

[74] *See id.* at 336; *accord Wine & Spirits Wholesalers of Mass., Inc. v. Net Contents, Inc.*, 10 F.Supp.2d 84, 87 (D.Mass.1998) (tort claim based on Federal Express's alleged violation of statutory licensing provisions for liquor transporters dealt with the act of and method employed in providing delivery services for wine and was thus preempted by the Airline Deregulation Act).

[75] The Attorney General argues that the economic nature of the tax regulation in *UPS I* distinguishes it from this case because Congress intended to preempt economic regulation, not regulation of health and safety. Def.'s Mot. at 9-10, 16; Def.'s Opp'n at 11-12. The FAAAA's legislative history does refer to "economic regulation," but does not define the term (and the Attorney General does not suggest a definition). *See* H.R.Rep. No. 103-677, at 82, *reprinted in* 1994 U.S.C.C.A.N. at 1754 (noting that one purpose of the preemption provisions is to even the playing field between air carriers and motor carriers "with respect to intrastate economic trucking regulation"); *id.* at 84 (states may not use their permissible regulatory authority "as a guise for continued economic regulation as it relates to prices, routes or services"); *id.* at 87 (citing the Ninth Circuit's holding in *Fed. Express*, 936 F.2d at 1079, that the Airline Deregulation Act preempted "intrastate economic regulations for motor carriers" as applied to Federal Express). In interpreting the Airline Deregulation Act preemption provision in *Federal Express*, the Ninth Circuit concluded that the term "economic

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the purpose of the Puerto Rico requirement was to ensure excise tax collection, whereas the purpose of this Maine provision is minors' health.[76] But a worthy purpose does not save a state statute from federal preemption.[77]

According to the First Circuit, courts should derive Congress's intent not only from the words of the statute but also from the statute's structure and purpose.[78] Here, the congressional purpose is apparent in the language of

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regulations" includes regulations that bear on price *and* regulations that relate to a carrier's terms of service because, as the First Circuit quoted in *UPS I*, "[t]erms of service determine cost. To regulate them is to affect the price. The terms of service are as much protected from state intrusion as are the air carrier's rates." 936 F.2d at 1078 (quoted in *UPS I*, 318 F.3d at 336). Under this definition, which I look to because it was cited with approval by the First Circuit and is consistent with the language and purposes of the FAAAA, the Maine regulations are economic because they affect the carriers' terms of service and, accordingly, affect the price of the carriers' services. There is therefore no basis for an economic/non-economic distinction between the Puerto Rico law in *UPS I* and the Maine regulations.

[76] As I observed at the outset, the Maine statute as a whole has a dual purpose: tax collection and protection of minors' health. The particular challenged provisions, however, achieve only the health purpose and have no apparent relationship to tax collection. Def.'s Reply Br. at 4 (noting that although one purpose of the statute is tax collection, the challenged provisions relate only to the statutory purpose of restricting minors' access to tobacco).

[77] *See, e.g., Witty*, 366 F.3d at 386 (concluding that the Airline Deregulation Act preempted a tort lawsuit alleging that the airline was negligent in creating a risk of deep vein thrombosis, a health condition with potentially serious complications).

[78] *UPS I*, 318 F.3d at 334. Perhaps that analysis is for implied preemption, not argued here. *See Morales*, 504 U.S. at 383, 112 S. Ct. 2031 ("pre-emption may be either express or implied, and is compelled whether Congress's command is explicitly stated in the statute's language or implicitly contained in its structure and purpose") (internal quotation omitted). I consider it, however, in light of the First Circuit's pronouncement in *UPS I*.

the FAAAA preemption provisions, Congress's view of the problem it was dealing with, and the legislative history: Congress wanted to avoid the burden on interstate commerce caused by diverse state regulations.[79] The structure of the preemption provisions reflects this congressional intent, for the provisions enlarge the Airline Deregulation Act's already broad preemption scheme.[80] Indeed, as other individual states promulgate restrictions that vary a little or a lot from what Maine has done,[81] the growing complexity

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[79] *See* Pub.L. No. 103-305, § 601(a) (findings); H.R.Rep. No. 103-677, at 87, *reprinted in* 1994 U.S.C.C.A.N. at 1759.

[80] *See* FAAAA, Pub.L. No. 103-305, § 601(b), (c). Other than the preemption provisions, the structure and content of the FAAAA are not helpful in determining Congress's intent. Some provisions advance goals similar to those of the preemption provisions, by limiting the burdens on interstate commerce caused by the taxation of airport businesses, *see id.*, § 112(e), and promoting the efficiency of air transportation, *see id.* § 104 (administration of airport improvement programs should employ technology and approaches that will promote efficiency in air transportation). But most of the statute authorizes various research programs, reports, fees and appropriations unrelated to the preemption of state regulation or the general goal of deregulation. The structure of the statute is useful to consider but not as significant as it would be if the parties were arguing implied, rather than express, preemption. *See Barnett Bank of Marion County, N.A. v. Nelson*, 517 U.S. 25, 31, 116 S. Ct. 1103, 134 L. Ed. 2d 237 (1996) (if "explicit pre-emption language does not appear [in the statute], or does not directly answer the question . . . courts must consider whether the federal statute's 'structure and purpose,' or nonspecific statutory language, nonetheless reveal a clear, but implicit, pre-emptive intent"); *Morales*, 504 U.S. at 383, 112 S. Ct. 2031.

[81] *See, e.g.*, Conn. Gen.Stat. § 12-285c (permitting shipment and delivery of cigarettes only to cigarette distributors or dealers, warehouse operators and government employees); Okla. Stat. tit. 68, § 317.4 (shipping documents must include a statement that Oklahoma law prohibits shipping tobacco products to minors and requires the payment of applicable taxes, and the shipper must use a delivery service that requires the recipient or an adult at the same address to sign and demands proof, if the person signing appears to be under twenty-seven,

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those laws will present to the market of interstate delivery services demonstrates why Congress preempted individual state regulation in favor of a uniform federal approach.[82]

The Attorney General argues nevertheless that Congress did not intend to preempt state regulation of the delivery of illegal products.[83] But in broadly restricting

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that the person signing is an adult and is the addressee or is living at the addressee's address); Wash Rev.Code § 70.155.105 (requiring anyone mailing, shipping, or delivering cigarettes to: obtain a written statement on the first delivery to an individual certifying the recipient's age, address and understanding of relevant tobacco laws; verify this statement against a data base or obtain an approved form of photo identification; and include as a part of the shipping documents a statement that the law prohibits shipment of tobacco to anyone under eighteen and requires the payment of applicable taxes). *See also* the discussion above, in the Legal Background, of the differences in the state tobacco laws.

[82] At the time the FAAAA was enacted, Congress noted impermissible regulations in forty-one states. This "patchwork of regulation" included entry controls that varied from liberal to strict; price regulation that, for a carrier that wanted to change its prices, involved expensive and time-consuming procedures in each state the carrier operated; regulations on tariff filing; and regulation of the types of commodities carried. H.R.Rep. No. 103-677, at 86-87, *reprinted in* 1994 U.S.C.C.A.N. at 1758-59.

[83] Def.'s Mot. for Summ. J. at 14-15. The Contraband Cigarette Trafficking Act arguably preserves the states' rights to regulate the transportation of contraband cigarettes because, as noted above, it provides that federal regulation of contraband cigarettes does not affect the states' authority "to enact and enforce cigarette tax laws, to provide for the confiscation of cigarettes and other property seized for violation of such laws, and to provide for penalties for the violation of such laws." 18 U.S.C. § 2345(a). But this provision preserves only state authority to enact and enforce cigarette tax laws. The challenged provisions here relate to restricting minors' access to tobacco, not tax collection. *See* Def.'s Reply Br. in Further Support of his Mot. for Summ. J. ("Def.'s Reply Br.") at 4 (Docket Item 78) ("The Maine Legislature enacted the Tobacco Delivery Act for two purposes – but the Challenged Provisions only relate to one of those purposes, keeping tobacco out of the hands of

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state regulation of the transportation industry in the FAAAA, Congress necessarily limited the states' regulatory powers.[84] States may still regulate contraband, and even the delivery of contraband, but only if the regulation does not expressly refer to or significantly affect a carrier's prices, routes or services.[85]

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minors."). In any event, even if the challenged provisions did relate to tax collection, the 1978 provision in the Contraband Cigarette Trafficking Act predates the *Morales* Court's broad interpretation of the Airline Deregulation Act preemption provision in 1992 and Congress's enlargement of that provision in the FAAAA in 1994.

[84] The Attorney General relies on *Robertson v. State of Washington Liquor Control Board*, in which the Court of Appeals of Washington held that the FAAAA does not preempt state laws prohibiting the transportation of cigarettes on which the taxes had not been paid and providing for the seizure of vehicles used for such transportation. The court in *Robertson* determined that the Contraband Cigarette Trafficking Act "expressly preserved" Washington's authority to enforce its cigarette tax laws by seizing property used to violate those laws, and that the state laws "had no more than an 'indirect, remote, and tenuous' relationship with the deregulatory purposes of the FAAA Act." 102 Wash.App. 848, 10 P.3d 1079, 1084, 1085 (2000). Unlike *Robertson*, the Contraband Cigarette Trafficking Act does not apply to the issues raised in this case. Moreover, *Robertson* used a different definition of "related to" than the one I use here. Rather than adopting the express reference/forbidden significant effects definition from *Morales*, *Robertson* used a limited definition proposed by Justice Scalia for ERISA cases. *See id.* at 1082-83 (citing *Cal. Div. of Labor Standards Enforcement v. Dillingham Constr., N.A.*, 519 U.S. 316, 335-36, 117 S. Ct. 832, 136 L. Ed. 2d 791 (1997) (Scalia, J. concurring)).

[85] In my earlier ruling, I considered the statement in the FAAAA's legislative history that, at the time the FAAAA was enacted, certain states, including Maine, did not impermissibly regulate carriers' prices, routes or services. I interpreted the statement as implicit approval of these existing state statutes, some of which regulated the transportation of contraband. *See N.H. Motor I*, 301 F.Supp.2d at 45-46 (citing H.R.Rep. No. 103-677, at 86, *reprinted in* 1994 U.S.C.C.A.N. at 1758). In light of the plain language of the FAAAA and the holdings of *UPS I* and *UPS II*, this brief statement in the legislative history, which does

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(2) Subsection 1555-C(3)(A) and 1555-C(3)(C)

The other two challenged Maine provisions, 22 M.R.S.A. §§ 1555-C(3)(A) and (C), do not impose any direct obligations on carriers, and carriers face no penalties under them. Instead, these provisions apply to tobacco retailers who ship tobacco products.[86] Therefore, they do not meet the *Morales/UPS I* standard of express reference to a carrier's services.[87]

I turn then to the other component of the *Morales/UPS I* analysis: do these subsections have a "forbidden significant effect" upon carriers' services? I conclude that subsection 1555-C(3)(C) has that effect. That subsection requires tobacco retailers to use only carriers that guarantee

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not approve any specific statutes or indicate the extent of congressional research into statutes existing at the time the FAAAA was enacted, no longer persuades me that the FAAAA does not preempt the Maine statute.

[86] The portion of the statute that contains these two provisions begins: "The following provisions apply to a tobacco retailer shipping tobacco products pursuant to a delivery sale." 22 M.R.S.A. § 1555-C(3) (preamble to both (A) and (C)).

Subsection 1555-C(3)(A) provides that "[p]rior to shipping, the tobacco retailer shall provide to the delivery service the age of the purchaser." 22 M.R.S.A. 1555-C(3)(A). Subsection 1555-C(3)(C) requires that a

> tobacco retailer utilize a delivery service that imposes the following requirements: (1) the purchaser must be the addressee; (2) the addressee must be of legal age to purchase tobacco products and must sign for the package; and 3 if the addressee is under 27 years of age, the addressee must show valid government-issued identification that contains a photograph of the addressee and indicates that the addressee is of legal age to purchase tobacco products.

22 M.R.S.A. § 1555-C(3)(C).

[87] *See N.H. Motor I*, 301 F.Supp.2d at 43.

to provide certain services, specifically: that the carrier will deliver the product only to the actual purchaser of the product; will require the actual purchaser to sign for the package and to be old enough to purchase tobacco legally; and will require, as a condition of delivery if that person is under twenty-seven, a valid government-issued photo identification showing legal age to purchase tobacco.[88] The summary judgment record demonstrates that for a carrier to make those guarantees, the carrier will have to: examine every package the carrier receives with a Maine destination address to determine if it contains tobacco products; ensure that its driver delivers only to the particular addressee (not leaving the package on the porch or with whoever answers the door or with a neighbor or in the office mailroom); and in addition determine whether the addressee is under twenty-seven, and, if so, demand valid government-issued photo identification showing legal age to purchase tobacco.[89]

The analysis is similar to that for section 1555-D. Like that section, subsection 1555-C(3)(C) impermissibly affects carriers' services because it results in a carrier (who wishes to participate in this commerce) having to identify the contents of the package to determine whether it must impose the delivery conditions listed in the statute.[90] Imposing these conditions on delivery causes carriers' drivers to alter their delivery practices for packages in Maine containing tobacco products, and can delay delivery

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[88] 22 M.R.S.A. § 1555-C(3)(C); 10-144 Code Me. R. Ch. 203, § 10(C)(3).

[89] *See* Pls.' SMF, Def.'s Responsive SMF ¶¶ 23, 50, 60-67.

[90] *See UPS II*, 385 F.3d at 14; *accord Wine & Spirits Wholesalers*, 10 F.Supp.2d at 87.

of the package with tobacco products and subsequently delivered packages if the driver is unable to find the addressee to receive the package.[91] Under *UPS I*, these effects are sufficient to preempt subsection 1555-C(3)(C).[92]

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[91] *See* Pls.' SMF, Def.'s Responsive SMF ¶¶ 42-44, 51, 58, 60-67. Although the Attorney General admits that having to deliver to the addressee can cause various problems for the carrier, *see* Def.'s Responsive SMF ¶¶ 60-67, the Attorney General denies that these problems could cause delay, stating that "UPS has not studied the cost or feasibility of providing a service that restricts delivery to a particular person," *id.* ¶ 68. As I noted above, *see* footnotes 54 and 55, the associations do not need to present an empirical study to prove the delay that could logically result from these complications.

[92] *See* 318 F.3d at 336. The Attorney General responds that UPS could "charge the shipper an appropriate amount" for the extra activities. Def.'s Opp'n at 7. That response demonstrates the forbidden significant effects that prompt preemption, for it represents a direct effect on price (or profitability and hence competitiveness).

Despite the Attorney General's argument that, because of dollar amounts, I should consider the effects here not sufficient to reach the "significant" level of the "forbidden significant effect" standard, I conclude that no more is required. *See id.* at 4, 8. *Morales* should not be read to require courts to assess the actual competitiveness of a particular market to determine when effects reach the level of significance. For the same reason, I reject the Attorney General's argument that UPS was required to do more empirical research or industrial engineering studies. *See, e.g., id.* at 4, 7, 14-16; Def.'s Mot. for Summ. J. at 5-7. There is no suggestion of such a requirement in *UPS I* and *UPS II*. *Accord Witty* 366 F.3d at 383 (using logic rather than data to find significant effects); *see also Wolens*, 513 U.S. at 226, 115 S. Ct. 817 (rejecting a distinction between matters essential and unessential to airline operations in deciding preemption); *Morales*, 504 U.S. at 388, 112 S. Ct. 2031 (determining, "as an economic matter," that state regulation of false advertising will have a forbidden significant effect on fares, without mentioning any empirical data).

Therefore, I do not resolve the parties' disagreement over whether an additional two seconds are really necessary to examine every package coming to Maine, leading to an annual $144,000 expense, Def.'s Opp'n at 3-4; whether it is the Maine statute that has prompted a UPS

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Without the delivery conditions of subsection 1555-(C)(3)(C), subsection 1555-C(3)(A) has no apparent remaining purpose. It requires that a tobacco retailer tell the carrier the age of the purchaser before shipping a tobacco product.[93] This subsection results only in the carrier receiving information about the purchaser's age: the carrier does not have to do anything with this information without the requirements of subsection 1555-C(3)(C). This effect on carriers' services is not significant. I do not find subsection 1555-C(3)(A) to be preempted because it does not have a significant effect on carriers' services.[94]

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business decision not to accept certain packages or whether there are no tobacco shippers currently interested in shipping directly to Maine consumers in any event, *see* Def.'s Mot. at 12-13; Def.'s SMF ¶¶ 87-94; the cost of dealing with packages identified as containing tobacco (UPS says two dollars per package; the State attacks the basis for the estimate), Def.'s SMF ¶ 128; and the costs of training UPS's Maine personnel to comply with the delivery requirements, Def.'s Responsive SMF ¶ 88; *see* Def.'s Mot. for Summ J. at 16-17.

[93] 22 M.R.S.A. § 1555-C(3)(A); *see also* 10-144 Code Me. R. Ch. 203, § 10(C)(1).

[94] Both the associations and the Attorney General contend that the recent Supreme Court decision in *Granholm v. Heald* supports their arguments. Pls.' Notice of Post-Submission Supreme Court Authority Relevant to the Parties' Cross Motions for Summary Judgment (Docket Item 90); Def.'s Notice of Recent Relevant Precedent (Docket Item 91). But *Granholm* does not affect the outcome in this case because the questions there are different. The Court in *Granholm* invalidated state regulations that restricted out-of-state wineries' direct shipments to consumers when in-state shipments were permitted. ___ U.S. ___, ___, 161 L. Ed. 2d 796, 125 S. Ct. 1885, 1892, 2005 WL 1130571, at *5 (2005). The attack on the state regulation there was under the Commerce Clause, not the FAAAA. Moreover, the Court in *Granholm* focused extensively on the Twenty-First Amendment to the United States Constitution, which deals with alcohol, but not tobacco, and federal statutes regulating the sale of alcohol. *See id.* at 1897-1906 (determining, based on a detailed analysis of the Twenty-First Amendment and relevant statutes and caselaw, that the Amendment does not

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IV. RELIEF

The associations request a declaratory judgment under 28 U.S.C. §§ 2201 and 2202, declaring that subsections 1555-C(3)(A) and (C) are completely preempted and that section 1555-D is preempted as applied to motor and air/ground carriers.[95] Aside from his merits-related arguments, the Attorney General does not respond to the associations' request for a declaratory judgment. Whether the FAAAA preempts the challenged Maine provisions presents "a case of actual controversy" under 28 U.S.C. § 2201(a) because the parties have adverse legal interests and there is a real threat of prosecution under the challenged Maine provisions.[96] The associations are therefore entitled to the declaratory relief they request for the preempted provisions, subsection 1555-C(3)(C) and section 1555-D, but not for subsection 1555-C(3)(A), which is not preempted.

The associations also request a permanent injunction against any enforcement of subsections 1555-C(3)(A) and 1555-C(3)(C) and against enforcement of section 1555-D against motor carriers and air/ground carriers.[97] The

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permit discrimination against imported liquor); *id.* at 1907-09 (Stevens, J., dissenting) (stating that the Twenty-First Amendment allows the state regulations because "our Constitution has placed commerce in alcoholic beverages in a special category"); *id.* at 1909-27 (Thomas, J., dissenting) (questioning the majority's interpretation of statutes and caselaw on the sale of alcohol).

[95] Pls.' Compl. ¶¶ 1, 2(a), (b), 46-49(b).

[96] *See* Pls.' SMF, Def.'s Responsive SMF ¶ 92 (Maine is enforcing the challenged provisions); 10B Charles Alan Wright, *et al.*, *Federal Practice and Procedure*, § 2757, at 473, 486-87 (3d ed.1998).

[97] Pls.' Compl. ¶¶ 1, 2(c), 49(c); Pls.' "As Applied" Mot. for Summ. J. at 23-25.

Attorney General does not argue that injunctive relief is inappropriate. To issue a permanent injunction, I must determine that: (1) the plaintiffs prevail on the merits; (2) the plaintiffs would suffer irreparable injury in the absence of injunctive relief; (3) the harm to the plaintiffs would outweigh the harm that the defendant would suffer from the imposition of an injunction; and (4) the public interest would not be adversely affected by an injunction.[98]

The associations are not entitled to injunctive relief for subsection 1555-C(3)(A) because they have not prevailed on the merits of that claim. The associations have prevailed on the merits of their preemption claims for subsection 1555-C(3)(C) and section 1555-D of the Maine statute. The associations' members would suffer irreparable injury without injunctive relief because the enforcement of the preempted provisions causes at least one carrier to alter its uniform delivery procedures for Maine packages and affects its business by interfering with its timely and efficient delivery of packages.[99] There is no suggestion that any such loss could be recovered from the State.

The harm to the associations' members from enforcement of the preempted provisions would outweigh the harm to the State from imposing the requested injunction. The injunction the associations request would enjoin enforcement of subsection 1555-C(3)(C) and enforcement of section 1555-D against motor and air/ground carriers: the

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[98] *A.W. Chesterton Co. v. Chesterton*, 128 F.3d 1, 5 (1st Cir.1997).

[99] *See United Parcel Serv., Inc. v. Flores-Galarza* ("*UPS* "), 210 F.Supp.2d 33, 44 (D.P.R.2002); *see also UPS I*, 318 F.3d at 337 (affirming the district court's determination that injunctive relief was appropriate).

State could enforce the rest of the statute, and could still enforce section 1555-D against anyone other than motor and air/ground carriers. Much of the statute would thus remain unaffected by enjoining enforcement of the pre-empted provisions.

Finally, an injunction would not adversely affect the public interest. As the trial court noted in *UPS*, Congress determined that the FAAAA preemption provisions serve the public interest by reducing the inefficiency, costs, inhibition of innovation and technology, and limitations on the expansion of markets caused by state regulation.[100]

The Attorney General does argue that any ruling and resulting declaratory and injunctive relief should apply only to UPS.[101] But that limitation would be inconsistent with the congressional purpose, for it would permit one carrier to have privileges that others do not, an intrusion into the competitive marketplace.[102] Moreover, the words of the statute are contrary: A state law is preempted if it "relate[s] to a price, route or service *of any* motor carrier," or "of an air carrier or carrier affiliated with a direct air

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[100] *See* 210 F.Supp.2d at 44-45; H.R.Rep. No. 103-677, at 87, *reprinted in* 1994 U.S.C.C.A.N. at 1759; *see also* Pub.L. No. 103-305, § 601(a) (findings).

[101] Def.'s Mot. for Summ. J. at 11 n.8.

[102] *See* H.R.Rep. No. 103-677, at 82, 87, *reprinted in* 1994 U.S.C.C.A.N. at 1754, 1759 (the purpose behind the FAAAA preemption provisions is to uniformly regulate carriers, regardless of their corporate form, by eliminating the patchwork of state regulation and the competitive advantage air carriers enjoyed over other carriers under the Airline Deregulation Act).

carrier."[103] I therefore will not limit the ruling or the relief to UPS.[104]

The plaintiffs shall submit a proposed injunction by June 17, 2005, after first consulting with the Attorney General's office to resolve all issues as to form and scope not resolved in this opinion. The relief proposed shall "be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs."[105] The defendant shall file any response by June 24, 2005.

V. CONCLUSION

Although the Maine Tobacco Delivery Law has very worthy motives, I conclude that two provisions "relate[ ] to" a "service of any motor carrier" or air/ground carrier "with respect to the transportation of property," and are therefore preempted.[106] Section 1555-D expressly references

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[103] 49 U.S.C. §§ 14501(c)(1), 41713(b)(4)(A) (emphasis added).

[104] The Attorney General has also requested briefing on "the severability issue": whether any of the challenged Maine provisions that remain are enforceable without the preempted provisions. Def.'s Mot. for Summ. J. at 19. There is no need for briefing on severability in light of my separate preemption analysis for each challenged provision and the absence of any argument from the associations that the preemption of one or some of the challenged provisions affects the enforceability of the rest.

[105] *UPS I*, 318 F.3d at 337 (quoting *Califano v. Yamasaki*, 442 U.S. 682, 702, 99 S. Ct. 2545, 61 L. Ed. 2d 176 (1979)).

[106] 49 U.S.C. §§ 14501(c)(1), 41713(b)(4)(A). Each side suggests that a parade of horribles will follow from whatever ruling I make. The Attorney General says that a ruling in favor of the associations will call into question state laws about delivery of guns, stolen property, drugs, explosives, liquor, etc. *See* Def.'s Mot. for Summ. J. at 5. The associations have said that a ruling in the Attorney General's favor will leave them subject to whatever new product becomes the next subject of state

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carriers, and significantly affects carriers by causing them to alter their procedures for preparing packages for delivery and for returning packages containing tobacco products. Subsection 1555-C(3)(C) imposes conditions on tobacco shippers that inevitably impose significant effects on a carrier's delivery services: unless a carrier is willing to make the required guarantees, it is foreclosed from this part of the transportation market. Whatever one might think of the social benefits or costs of delivering tobacco products, the effects of sections 1555-D and 1555-C(3)(C) are the types of effects that the FAAAA forbids. The effects are not "too tenuous, remote or peripheral" to escape preemption.[107]

I therefore **GRANT** the plaintiffs' motion for summary judgment and **DENY** the defendant's motion for summary judgment for section 1555-D and subsection 1555-C(3)(C) of the Maine statute because the FAAAA preempts these provisions. I **DENY** the plaintiffs' motion for summary judgment and **GRANT** the defendant's motion for summary

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concern, for example, herbal and dietary supplements or whatever else is next on an ever-changing list of popular concern. *See* Pls.' Reply Mem. in Support of Facial Mot. for Summ. J. at 3 (Docket Item 18). The answer to both these arguments is that each case will have to be argued and resolved on its own merits. I do note that *Morales* suggests that some things are too distantly related to be preempted (in that case, state laws against prostitution and gambling as they might be applied to passengers in an aircraft). *See* 504 U.S. at 390, 112 S. Ct. 2031.

[107] *Morales*, 504 U.S. at 390, 112 S. Ct. 2031. The State, through subsection 1555-C(3)(C), has essentially required carriers to provide a service that guarantees delivery only to adults, and through section 1555-D has made the carriers' service less efficient by requiring them to alter their delivery procedures to identify, determine if they can deliver, and potentially contact the shipper to retrieve packages containing tobacco products. Those "service" requirements are hardly tenuous, remote or peripheral regulations.

judgment on subsection 1555-C(3)(A), which is not preempted by the FAAAA. I **DENY** the plaintiffs' request for declaratory relief for subsection 1555-C(3)(A), but I **GRANT** the plaintiffs' request for declaratory relief for section 1555-D and subsection 1555-C(3)(C), and declare that the FAAAA preempts 22 M.R.S.A. § 1555-C(3)(C) in its entirety and preempts 22 M.R.S.A. § 1555-D as applied to motor carriers and air/ground carriers. I will issue an injunction after the parties submit their proposed language.

So ORDERED.

DATED THIS 27TH DAY OF MAY, 2005

D. BROCK HORNBY

UNITED STATES DISTRICT JUDGE

NEW HAMPSHIRE MOTOR TRANSPORT ASSOCIATION, ET AL., PLAINTIFFS v. G. STEVEN ROWE, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF THE STATE OF MAINE, DEFENDANT

CIVIL NO. 03-178-B-H

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MAINE

324 F. Supp. 2d 231; 2004 U.S. Dist. LEXIS 12105

June 30, 2004, Decided

COUNSEL: For NEW HAMPSHIRE MOTOR TRANSPORT ASSOCIATION, MASSACHUSETTS MOTOR TRANSPORTATION ASSOCIATION, INC., VERMONT TRUCK AND BUS ASSOCIATION, INC., Plaintiffs: MICHAEL A. NELSON, Jensen, Baird, Gardner & Henry, Portland, ME.

For NEW HAMPSHIRE MOTOR TRANSPORT ASSOCIATION, MASSACHUSETTS MOTOR TRANSPORTATION ASSOCIATION, INC., VERMONT TRUCK AND BUS ASSOCIATION, INC., Plaintiffs: LAWRENCE R. KATZIN, PAUL T. FRIEDMAN, RUTH N. BORENSTEIN, Morrison & Foerester LLP, San Francisco, CA.

For G. STEVEN ROWE, in his official capacity as Attorney General for the State of Maine, Defendant: MELISSA REYNOLDS O'DEA, PAUL D. STERN, Office of the Maine Attorney General, Augusta, ME.

JUDGES: D. BROCK HORNBY, UNITED STATES DISTRICT JUDGE.

OPINION BY: D. BROCK HORNBY

OPINION:

ORDER ON DEFENDANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT AND PARTIAL MOTION TO DISMISS

Earlier I ruled (on the plaintiff carrier associations' motion) that federal law does not preempt certain challenged provisions of Maine's Tobacco Delivery Law. I now grant partial summary judgment to the Maine Attorney General on that claim. I also conclude that the carrier associations have standing to assert an as-applied preemption challenge to the statute even though they rely on its effects on a particular association member.

ANALYSIS

(1) The Facial Challenge

New Hampshire Motor Transport Association, Massachusetts Motor Transport Association, Inc., and Vermont Truck & Bus Association, Inc. ("the carrier associations") are non-profit trade associations whose members are in the interstate transportation business. Previously, they moved for summary judgment arguing that, by their express terms, three provisions of Maine's Tobacco Delivery Law – 22 M.R.S.A. §§ 1555-C(3)(A), 1555-C(3)(C), and 1555-D – are facially preempted by the Federal Aviation Administration Authorization Act of 1994 ("FAAAA"). *See N.H. Motor Transp. Ass'n v. Rowe,* 301 F. Supp. 2d 38, 40 (D. Me. 2003). I disagreed, concluding that federal law does not completely foreclose Maine from exercising its traditional police powers to restrict delivery of tobacco. *Id.* I therefore held that the FAAAA did not facially preempt the Maine statutory provisions, and denied the carrier associations' motion for summary judgment. *Id.* at 46.

In light of my earlier ruling, the defendant Maine Attorney General now requests that I enter partial summary judgment in his favor on all Counts as to any facial challenge. The carrier associations resist this motion arguing that: (1) a further "evidentiary showing" is necessary to rule on this issue; (2) my earlier decision relied on statutes not addressed by the parties; and (3) the carrier associations' Complaint does not assert a facial challenge.

First, discovery or an "evidentiary showing" on the effect of the challenged provisions of Maine's Tobacco Delivery Law is not necessary to a ruling on a facial preemption challenge. As the carrier associations argued when they brought the motion initially, such a ruling examines only the express terms of the statute, not the actual effect of the law. *See id.* at 40 n.2.

Second, I did take judicial notice of Maine's and other states' statutes to determine whether Maine was exercising a traditional police power in restricting the delivery of tobacco. *See id.* at 44-45 & n.13. That research and analysis was appropriate, regardless of whether the parties cited the particular statutes to which I referred. (It is not unusual for a judge to rely on a case or statute that the parties did not cite.) It was essential to examine such laws in assessing the presumption against preemption when Congress legislates in a field traditionally regulated by a state pursuant to their historic police powers. *See, e.g., United Parcel Serv., Inc. v. Flores-Galarza,* 318 F.3d 323, 336 (1st Cir. 2003); *Greenwood Trust Co. v. Mass.,* 971 F.2d 818, 823 (1st Cir. 1992).

Third, I am perplexed by the carrier associations' argument that "there is no 'Facial Preemption Claim' in the Complaint on which the Attorney General could be

granted judgment." Pls.' Opp'n to Def.'s Mot. for Partial Summ. J. and Partial Mot. to Dismiss ("Pls.' Opp'n") at 2 (Docket Item 41). To be sure, the Complaint states two causes of action (under the Supremacy Clause and the Declaratory Relief Act), and neither is entitled "Facial Challenge." But the Complaint also asserts that the Maine provisions are preempted by federal law because they "expressly refer to" and "have a significant effect on" motor carrier services. *See* Compl. ¶¶ 30-31 (Docket Item 1).

It was the carrier associations who embarked upon a bifurcated summary judgment strategy, first asserting a facial challenge "based on the face of the statute," and promising, if their facial attack was unsuccessful, an as-applied challenge.[1] At the conference of counsel held on January 8, 2004, the carrier associations' attorney stated:

> What we have tried to do is make an initial motion to try to get an expeditious resolution without going into the facts *based on the face of the statute,* expressed terms of the statute, saying that it is preempted without making a showing

[1] In a footnote, the carrier associations state: "The 'facial' and 'as-applied' labels are not particularly suitable here because, in this action, the Carriers only challenge 22 M.R.S.A. section 1555-D 'as applied' to motor carriers and air/ground intermodal carriers. (*See* Compl. ¶ 2(b).) That 'as applied' limitation existed even in the Carriers' 'express terms' motion. Nonetheless, for simplicity, the Carriers will use the label 'facial' to refer to their 'express terms' motion, and will use the label 'as applied' to refer to their forthcoming evidence-based 'in effect' motion." Pls.' Opp'n at 2 n.1. To the extent I understand the footnote, the carrier associations are stating that they can challenge only the Maine law provisions that apply to their members as ground carriers (*i.e.*, they cannot challenge the provisions as they are applied to other entities). In any event, the choice of terms used in labeling these different challenges in no way affects the substantive outcome of my decision on the "facial" or "express terms" motion.

> in all ways in which the challenged provisions affects carriers' prices throughout. So we want to try and do this, move for summary judgment just based on the expressed terms of the statute.

Tr. of Conf. of Counsel at 3 (Jan. 8, 2004) (Docket Item 25) (emphasis added). Thus, it was clear to everyone that as a first step the carrier associations were pursuing a facial challenge. At the conference, I later stated "Assuming I'm going to deal with the facials first, since you are here I want to consider what might happen in either direction. If I don't strike it down facially then there will be the issue [on the] facts, I take it." *Id.* at 6.

Now, the Maine Attorney General asks for partial summary judgment on the same facial challenge issue the carrier associations brought earlier. Although the "facial challenge" is not a cause of action in the carrier associations' Complaint, the Maine Attorney General is certainly entitled to request partial summary judgment to limit the scope of relief available or the legal breadth of the causes of action. In my earlier order, I concluded that on a facial challenge, determined only by reading the express terms of the statute, the FAAAA did not preempt the challenged provisions of Maine Tobacco Delivery Law. *N.H. Motor Transp. Ass'n,* 301 F. Supp. 2d at 46. I therefore **GRANT** the defendant's motion for partial summary judgment on all counts as to any facial FAAAA preemption challenges to 22 M.R.S.A. §§ 1555-C(3)(A), 1555-C(3)(C), and 1555-D.

(2) Associational Standing

The Maine Attorney General moves for dismissal of the Complaint on the basis that the plaintiff carrier

associations lack standing to bring any as-applied challenges on behalf of their members.[2] Primarily, the Maine Attorney General is concerned that the whole premise of the plaintiffs' challenge to the law is based upon its effect on United Parcel Service ("UPS"), yet UPS is not a party to the suit. The Maine Attorney General feels unfairly prejudiced in not being able to treat UPS as a party (with any procedural or substantive advantages that follow) in preparing the case for trial.

The United States Supreme Court has recognized that standing doctrine is comprised of both Article III constitutional considerations and prudential concerns. *See, e.g., Elk Grove Unified Sch. Dist. v. Newdow,* No. 02-1624, 159 L. Ed. 2d 98, 124 S. Ct. 2301 2004 U.S. LEXIS 4178, *16-17 (June 14, 2004). For associations like these carrier

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[2] The carrier associations argue that the Maine Attorney General's motion to dismiss should be denied as untimely under Fed. R. Civ. P. 12(b) because the Attorney General had previously filed an Answer, and "[a] motion making any of these defenses shall be made before pleading." *See* Pls.' Opp'n at 4 n.6 (citing Fed. R. Civ. P. 12(b)(6)). The Maine Attorney General filed his Answer on November 3, 2003. His motion to dismiss was filed April 15, 2004. But in his Answer the Maine Attorney General raised the affirmative defense that the plaintiffs lacked standing. *See* Answer, Seventh Affirmative Defense at 7 (Docket Item 15). Thus, his so-called motion to dismiss only brought forward for hearing and decision a defense he had timely raised. Moreover, the defense of failure to state a claim is timely up until trial. Under Fed. R. Civ. P. 12(h)(2), "[a] defense of failure to state a claim upon which relief can be granted . . . may be made in any pleading permitted or ordered under Rule 7(a), or by motion for judgments on the pleadings, *or at the trial on the merits*." (emphasis added.) *See also* 5A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1361, at 446-47 (1990) ("Moreover, under Rule 12(h) the defenses of . . . Rule 12(b)(6) . . . are preserved from the waiver mechanism in Rule 12(h). Thus, motions raising any of these matters may be considered by the court even when interposed after the responsive pleading has been filed, although technically they no longer are Rule 12(b) motions.").

associations, in *Hunt v. Wash, State Apple Adver. Comm'n*, 432 U.S. 333, 53 L. Ed. 2d 383, 97 S. Ct. 2434 (1977), the Supreme Court announced a three-part associational standing test: "an association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Id.* at 343. The Maine Attorney General asserts that the carrier associations here lack standing under the third prong of *Hunt*, arguing that the participation of individual members – primarily UPS – is required. This third prong of *Hunt* is prudential in nature, raising concerns of "administrative convenience and efficiency." *United Food and Commercial Workers Union Local 751 v. Brown Group, Inc.*, 517 U.S. 544, 557, 134 L. Ed. 2d 758, 116 S. Ct. 1529 (1996).

In their as-applied challenge, the carrier associations believe that they need only show that Maine's Tobacco Delivery Law has a "forbidden significant effect," *see Flores-Galarza*, 318 F.3d at 335, on "a price, route, or service of *any* motor carrier." 49 U.S.C. § 14501(c)(1) (1997) (emphasis added). In light of this FAAAA statutory language, the carrier associations intend to rely on the Maine Tobacco Delivery Law's effects on only one association member, UPS. *See* Tr. of Conf. of Counsel at 8-9 (Mar. 29, 2004) (Docket Item 31) (The plaintiffs' counsel stated, "So in a way because it's my burden to show the significant effect, and if I'm prepared to do it with UPS alone, it seems to me that's my risk . . . "); Pls.' Opp'n at 9-10 (stating that "the Carriers can prevail by showing the Challenged Provisions' effect on a single carrier" and that

"UPS is the association member whose experience with the Challenged Provisions will provide the basis for the Carriers' as-applied challenge"). Obviously, therefore, both sides will require detailed information about UPS and the Maine law's effect upon it. Does this mean that the claim asserted by the carrier associations requires the participation of this individual association member within the meaning of *Hunt*? In the absence of UPS as a party, the Maine Attorney General raises a number of practical concerns regarding access to information not in the possession of the associations, but instead in the sole control of nonparty UPS:[3]

> The members seek relief from the Court but refuse to subject themselves to the normal discovery to which they would be subject under the Rules if they sought the relief directly. The discovery devices available between parties are

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[3] The Maine Attorney General complains that obtaining discovery on other association members will also be hindered.

> Defendant cannot reasonably defend this case without the participation of those common carriers who plaintiffs allege have historically delivered tobacco to consumers, or have a desire to do so. It is no solace that plaintiffs suggest they must carry their burden (which is in actuality the burden of their members), and will present whatever facts they and their members believe is appropriate. Discovery is not so limited as to allow one party to completely control discovery and the exploration of facts. Plaintiffs' strategy of using associational standing to challenge a statute on behalf of its members but protect its members from discovery should not be countenanced.

Def.'s Mot. for Partial Summ. J. and for Partial Mot. to Dismiss at 8 (Docket Item 32). However, even if UPS were a party plaintiff, the Maine Attorney General would still have to obtain discovery from the other association members through nonparty procedures. I therefore address only the absence of UPS from the lawsuit.

> there for a reason: to allow for efficient, inexpensive and fair resolution of disputes utilizing, *inter alia,* interrogatories, requests for admissions and part depositions. And, particularly from the defendant's standpoint in a case brought in Maine where the plaintiffs appear to be relying upon one large carrier [UPS], having discovery *in Maine* is logistically and economically important. Simply put, third-party discovery in this case is neither fair, nor efficient, nor inexpensive. We do not believe that the courts envisioned associational standing to be used, as it is here, as a sword to obtain relief for an association's members but, at the same time, to shield those members from the normal and requisite discovery that any plaintiff subjects itself to when coming to federal court seeking relief.

Def.'s Reply at 5 (Docket Item 42).

In determining whether individual participation is necessary, however, the focus is on the nature of the relief requested (injunctive relief versus damages), not on discovery. In fact, *Hunt*'s third prong derives from the Supreme Court's decision in *Warth v. Seldin,* 422 U.S. 490, 45 L. Ed. 2d 343, 95 S. Ct. 2197 (1975), where the Court stated:

> So long as the nature of the claim and of the relief sought does not make the individual participation of *each* injured party indispensable to proper resolution of the cause, the association may be an appropriate representative of its members, entitled to invoke the court's jurisdiction.

Id. at 511 (emphasis added). "Accordingly, it appears that an association may assert a claim that requires participation by *some* members." *Hosp. Council of W. Pa. v. City of*

Pittsburgh, 949 F.2d 83, 89 (3d Cir. 1991) (emphasis in original). *Accord Penn. Psychiatric Soc'y v. Green Spring Health Servs., Inc.*, 280 F.3d 278, 285 (3d Cir. 2002); *Retired Chicago Police Ass'n v. City of Chicago*, 7 F.3d 584, 601-02 (7th Cir. 1993). Associational standing is generally granted in cases seeking injunctive relief rather than damages, because individualized proof is not necessary and the relief usually inures to the benefit of all members injured. *See Warth*, 422 U.S. at 515.

Under First Circuit precedent, in a case seeking only injunctive relief, like this case, where there is no need to allocate damages to each individual member, the basis for the requirement of individualized proof is missing. *See Playboy Enters., Inc. v. Public Serv. Comm'n of Puerto Rico*, 906 F.2d 25, 35 (1st Cir. 1990); *R.I. Brotherhood of Correctional Officers v. R.I.*, 357 F.3d 42, 48 (1st Cir. 2004) (citations omitted); *Camel Hair and Cashmere Inst. of Am., Inc. v. Associated Dry Goods Corp.*, 799 F.2d 6, 12 (1st Cir. 1986). *See also Retired Chicago Police Ass'n*, 7 F.3d at 602-03 (citations omitted); *Pharmaceutical Care Mgmt. Ass'n v. Rowe*, 307 F. Supp. 2d 164, 173 (D. Me. 2004).[4]

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[4] At oral argument, the Maine Attorney General argued that proving the factual (as-applied) inquiry for preemption is akin to proving damages. It is a creative argument, but ultimately unpersuasive in light of the relief requested. The plaintiffs' claim here depends "not on evidence that differs from member to member" like damages, but instead upon the adverse effects upon one association. *See Camel Hair*, 799 F.2d at 12. A claim for injunctive relief could only be akin to a damages claim if the plaintiffs were required to prove and allocate "substantial forbidden effects" among more than one association member. Here, there is no need to allocate, distribute or quantify these effects among various association members. Instead, "the relief sought . . . will affect all the members in the same way" (*i.e.*, they all would not be required to conform with the statute), and "there is no conflict here

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In fact, the First Circuit recognizes that although the opposing party may need information from individual association members, such discovery may be obtained via various techniques (*e.g.*, subpoena *duces tecum*), without making the members parties to the action. *See Playboy*, 906 F.2d at 35-36. "Just because a claim may require proof specific to individual members of an association does not mean the members are required to participate *as parties* in the lawsuit." *Id.* at 35 (emphasis in original). Although third-party discovery for a nonparty like UPS may be more cumbersome and somewhat more costly, discovery for parties and nonparties overall is fairly comparable.[5] I

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between the needs and interests of the members" (*i.e.*, no one member is seeking more relief than another). *Id.*

[5] Instead of merely noticing a deposition of UPS as a party, the Maine Attorney General must subpoena UPS under Fed. R. Civ. P. 45. Instead of filing a Fed R. Civ. P. 34 Request for Production of Documents, the Maine Attorney General must issue a subpoena *duces tecum* under the same Rule. *See* Fed. R. Civ. P. 34(c). However, the scope of discovery will remain constant. *See* Fed. R. Civ. P. 45, Advisory Committee Notes, 1991 Amendment, Subdivision (a) ("The person subject to the subpoena is required to produce materials in that person's control whether or not the materials are located within the district . . . within which the subpoena can be served. The nonparty witness is subject to the same scope of discovery under this rule as that person would be as a party to whom a request is addressed pursuant to Rule 34"); Fed. R. Civ. P. 45, Advisory Committee Notes, 1946 Amendment. Subdivision (d) (stating that Fed. R. Civ. P. 45(d)(1) "properly gives the subpoena for documents or tangible things the same scope as provided in Rule 26(b)"). *See also* William W. Schwarzer, Lynn H. Pasahow & James B. Lewis, *Civil Discovery and Mandatory Disclosure: A Guide to Efficient Practice* § 6[B][6], at 6-21-22 (2d ed. 1994); 8A Charles Alan Wright, Arthur R. Miller & Richard L. Marcus, *Federal Practice and Procedure* § 2209, at 393 & n.6 (1994); Fed. R. Civ. P. 45, Advisory Committee Notes, 1970 Amendment (stating that both Fed. R. Civ. P. 45 and Fed. R. Civ. P. 34 also allow for inspection and copying of documents).

Although Fed. R. Civ. P. 33 interrogatories may not be served upon nonparties, depositions upon written questions can be taken of nonpar-

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conclude that the discovery burdens are not sufficient to overcome associational standing and to require UPS to prosecute the lawsuit.[6]

I therefore conclude that the carrier associations have standing to pursue an as-applied preemption challenge. However, if it turns out that by virtue of the carrier associations' conduct that the Maine Attorney General's discovery is excessively inefficient or hampered, I will reconsider this ruling under *Hunt*'s third prong.[7]

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ties under Fed. R. Civ. P. 31. They may provide the functional equivalent of interrogatories. *See* Jay E. Grenig and Jeffrey S. Kinsler, *Handbook of Federal Civil Discovery and Disclosure* § 6.2 (2d ed.).

Finally, nonparties are not required to make initial disclosures under Fed. R. Civ. P. 26, nor are they required to respond to requests for admission under Fed. R. Civ. P. 36. But these devices are most useful as applied to the parties to the lawsuit in any event, here the associations.

[6] I am aware that Magistrate Judge Kravchuk has been working with the parties to ensure fair and efficient access to discovery information on subjects such as where the depositions of various UPS personnel will take place, the proper place for Fed. R. Civ. P. 30(b)(6) depositions, etc.

[7] I was initially concerned that UPS's refusal to join as a party plaintiff (it did so), represented by the identical law firm, in an FAAAA challenge to a Puerto Rico tax statute, *see UPS v. Flores-Galarza*, 210 F. Supp. 2d 33 (D.P.R. 2002), was only a tactical maneuver to increase the expense of the Maine Attorney General in litigating this case. At oral argument, however, the plaintiffs' lawyer advanced reasons why the associations are the party plaintiffs, one of those being that it can be disadvantageous for a particular company to challenge a tobacco-regulating law. *See* Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 3531.9, at 615 & n.135 (1984) (citing Joseph L. Sax, *Standing to Sue: A Critical Review of the Mineral King Decision*, 13 Nat. Res. J. 76, 78-79 (1973)) (stating individuals may be reluctant to be named plaintiffs and noting that association members may fear being individually identified with locally unpopular causes).

CONCLUSION

The defendant's motion for partial summary judgment is **GRANTED**. The defendant's partial motion to dismiss is **DENIED**.

SO ORDERED.

DATED THIS 30TH DAY OF JUNE, 2004

/s/ D. BROCK HORNBY

UNITED STATES DISTRICT JUDGE

NEW HAMPSHIRE MOTOR TRANSPORT ASSOCIATION, ET AL., PLAINTIFFS v. G. STEVEN ROWE, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF THE STATE OF MAINE, DEFENDANT

CIVIL NO. 03-178-B-H

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MAINE

301 F. Supp. 2d 38; 2004 U.S. Dist. LEXIS 1600

February 6, 2004, Decided

COUNSEL: For NEW HAMPSHIRE MOTOR TRANSPORT ASSOCIATION, MASSACHUSETTS MOTOR TRANSPORTATION ASSOCIATION, INC., VERMONT TRUCK AND BUS ASSOCIATION, INC., Plaintiffs: MICHAEL A. NELSON, Jensen, Baird, Gardner & Henry, Portland, ME.

For NEW HAMPSHIRE MOTOR TRANSPORT ASSOCIATION, MASSACHUSETTS MOTOR TRANSPORTATION ASSOCIATION, INC., VERMONT TRUCK AND BUS ASSOCIATION, INC., Plaintiffs: LAWRENCE R. KATZIN, PAUL T. FRIEDMAN, RUTH N. BORENSTEIN, Morrison & Foerester LLP, San Francisco, CA.

For G. STEVEN ROWE, in his official capacity as Attorney General for the State of Maine, Defendant: MELISSA REYNOLDS O'DEA, Assistant Attorney General, Augusta, ME.

JUDGES: D. BROCK HORNBY, UNITED STATES DISTRICT JUDGE.

OPINION BY: D. BROCK HORNBY

OPINION:

MEMORANDUM DECISION ON PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Does a federal statute that regulates interstate trucking preempt Maine's Tobacco Delivery Law, a law newly enacted to regulate delivery sales[1] of cigarettes and reduce teens' access to tobacco? Three truckers' associations have sued the Maine Attorney General seeking a declaration that federal law preempts the Maine legislation and an injunction against its enforcement. The truckers have moved for immediate summary judgment arguing that on their face federal and state law are in direct conflict and that the Maine law must give way. I disagree. I conclude that federal law does not completely foreclose Maine from exercising its traditional police powers to restrict delivery of tobacco. I therefore DENY the truckers' motion, pending further development of the record on how the law is applied.[2]

I. FACTS

New Hampshire Motor Transport Association, Massachusetts Motor Transport Association, Inc., and Vermont

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[1] Generally speaking, delivery sales are sales made by telephone, the internet, or other means such that the tobacco has to be delivered to the purchaser. 22 M.R.S.A. § 1551(1-B) (2003).

[2] At this stage of the proceedings, the truckers have asserted a facial preemption argument (determined by reading only the words of the Maine statute), not an as-applied challenge (determined by examining the actual effect of the law). The Maine Attorney General agreed at a January 8, 2004 conference of counsel that there is no pending cross-motion for summary judgment, and therefore the truckers' motion to strike is moot.

Truck & Bus Association, Inc. ("the truckers") are non-profit trade associations whose members are in the interstate transportation business. The truckers have brought suit against the Maine Attorney General to challenge provisions of Maine's Tobacco Delivery Law, 22 M.R.S.A. § 1551 *et seq.*, enacted on June 9, 2003. According to its title, the Tobacco Delivery Law is intended to regulate the delivery and sale of tobacco products, and to prevent the sale of tobacco products to minors. 2003 Me. Laws 444. *See also* L.D. 1236, Summary (121st Me. Legis. 2003); Comm. Amend. A to H.P. 910, L.D. 1236 (121st Me. Legis. 2003).

The truckers argue that, by their express terms, three provisions – 22 M.R.S.A. §§ 1555-C(3)(A), 1555-C(3)(C), and 1555-D – are facially preempted by the Federal Aviation Administration Authorization Act of 1994 ("FAAAA").[3] Section 1555-C(3)(A) directs that when tobacco retailers ship products pursuant to a delivery sale, the tobacco retailers must give the delivery service the age of the purchaser. Section 1555-C(3)(C) directs that tobacco retailers use only a delivery service that: (a) requires the purchaser and the addressee to be the same person; (b) requires the addressee to be of legal age to purchase tobacco products; and (c) requires the addressee to sign for the package, and, if under 27 years old, to present a valid identification showing proof of legal age. Section 1555-D, entitled "Illegal Delivery of Tobacco Products," provides:

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[3] That statute extends to trucking so as to level the playing field between air and motor carriers who, despite conducting similar operations, previously faced a patchwork of inconsistent regulation. H.R. Conf. Rep. No. 103-677, at 82, 87 (1994), *reprinted in* 1994 U.S.C.C.A.N. 1715, 1754, 1759 (citing *Federal Express Corp. v. California Pub. Utils. Comm'n*, 936 F.2d 1075 (9th Cir. 1991)).

> A person may not knowingly transport or cause to be delivered to a person in this State a tobacco product purchased from a person who is not licensed as a tobacco retailer in this State, except that this provision does not apply to the transportation or delivery of tobacco products to a licensed tobacco distributor or tobacco retailer.[4]

The truckers are presenting a "facial" challenge to the Maine law, arguing that preemption can be determined merely by reading its terms. Therefore, I do not at this point have information on how the law is actually being enforced or what its present effect is.[5]

II. ANALYSIS

A. Federal Preemption and the FAAAA

The Supremacy Clause of the United States Constitution provides that "the Laws of the United States . . . shall

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[4] Section 1555-D provides that a transporter is "deemed to know that package contains a tobacco product" if it is marked in accordance with section 1555-C(3)(B) ("The tobacco retailer shall clearly mark the outside of the package of tobacco products to be shipped to indicate that the contents are tobacco products and to show the name and State of Maine tobacco license number of the tobacco retailer."), or "if the person receives the package from a person listed as an unlicensed tobacco retailer by the Attorney General under this section."

[5] As of January 2004, no administrative rules have been adopted or proposed by Maine's Department of Human Services or Department of Administrative and Financial Services regarding the implementation of 22 M.R.S.A. §§ 1555-C, 1555-D. Human Services did publish rules implementing 22 M.R.S.A. § 1551-A. *See* Me. Code R. 10-144-203 (2004).

On August 28, 2003, the Tobacco Enforcement Coordinator of the State of Maine Office of the Attorney General did send letters to delivery services explaining the law's requirement. *See* Pls.' Statement of Material Facts ¶ 4.

be the supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. art. VI, § 1, cl. 2. Because of the Supremacy Clause, state laws that "interfere with, or are contrary to" constitutional federal law are preempted. *Greenwood Trust Co. v. Massachusetts,* 971 F.2d 818, 822 (1st Cir. 1992), *cert. denied,* 506 U.S. 1052, 122 L. Ed. 2d 129, 113 S. Ct. 974 (1993) (quoting *Gibbons v. Ogden,* 22 U.S. (9 Wheat.) 1, 211, 6 L. Ed. 23 (1824)). According to the Supreme Court, "pre-emption may be either express or implied, and is compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose." *Morales v. Trans World Airlines, Inc.,* 504 U.S. 374, 383, 119 L. Ed. 2d 157, 112 S. Ct. 2031 (1992) (quoting *FMC Corp. v. Holliday,* 498 U.S. 52, 56-57, 112 L. Ed. 2d 356, 111 S. Ct. 403 (1990)). Whether express or implied, the fundamental question is Congress's intent, as revealed in the language of the provisions as well as the structure and purpose of the statute. *See United Parcel Service, Inc. v. Flores-Galarza,* 318 F.3d 323, 334 (1st Cir. 2003) (citing *Morales,* 504 U.S. at 383). *See also Rhode Island Public Towing Assoc., Inc. v. State of Rhode Island,* 1997 U.S. Dist. LEXIS 3316, *9 (D. R.I. 1997) (citing *Morales,* 504 U.S. at 383; *Greenwood Trust,* 971 F.2d at 823; *French v. Pan Am Express, Inc.,* 869 F.2d 1, 2 (1st Cir. 1989)).

The FAAAA is a constitutional law passed by Congress to regulate interstate trucking. The purpose of the FAAAA is to prevent states from interfering with the goal of federal deregulation by imposing regulations of their

own.[6] *Flores-Galarza*, 318 F.3d at 335 (citing *Morales*, 504 U.S. at 378). Congress was explicit as to the law's preemptive effect:

> [A] State, political subdivision of a State, or political authority of 2 or more states may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of any motor carrier . . . with respect to the transportation of property.

49 U.S.C. § 14501(c)(1) (1997).[7] The First Circuit recently interpreted identical language in a parallel preemption

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[6] According to the federal drafters, a patchwork of state regulations of carriers, including "entry controls, tariff filing and price regulation, and types of commodities carried," had caused "significant inefficiencies, increased costs, reduction of competition, inhibition of innovation and technology and curtails the expansion of markets." H.R. Conf. Rep. No. 103-677, at 86-87, *reprinted in* 1994 U.S.C.C.A.N. at 1758-59.

[7] A number of state regulations and controls are expressly saved from preemption, for example: the safety regulatory authority of a state with respect to motor vehicles, the authority of a state to impose highway route controls or limitations based on the size or weight of the motor vehicle or the hazardous nature of the cargo, or the authority of a state to regulate motor carriers with regard to minimum amounts of financial responsibility relating to insurance requirements and self-insurance authorization. *See* 49 U.S.C. § 14501(c)(2).

None of the express exemptions applies to the challenged Maine Tobacco Delivery Law provisions. This is not a case about cargo liability or safety over the road, like speed limits or the transportation of hazardous materials. Tobacco is not hazardous in transit, but only when consumed. However, the quoted list is not exclusive, although Congress did not want states to use safety rules as a guise for economic regulation. H.R. Conf. Rep. No. 103-677, at 84, *reprinted in* 1994 U.S.C.C.A.N at 1756. ("This list is not intended to be all inclusive. . . . The conferees do not intend the regulatory authority which States may continue to exercise . . . to be used as a guise for continued economic regulation. . . .").

provision.[8] It ruled that the phrase "related to" has a broad meaning in ordinary usage, and when used in the FAAAA the preemption provision must likewise be given a broad reach.[9] *See Flores-Galarza,* 318 F.3d at 335. The First Circuit has concluded that state laws and regulations "having a connection with or reference to" a motor carrier's prices, routes or services are eligible for preemption. *See id.* (citing *Morales,* 504 U.S. at 384). According to the First Circuit, "[a] sufficient nexus [for preemption] exists if the law expressly references the [motor] carrier's prices, routes or services, *or* has a 'forbidden significant effect' upon the same." *Id.* (emphasis added) (citing *Morales,* 504 U.S. at 388).

B. Sections 1555-C(3)(A) and 1555-C(3)(C)

The truckers challenge sections 1555-C(3)(A), 1555-C(3)(C), and 1555-D. Sections 1555-C(3)(A) and 1555-C(3)(C), however, apply only to tobacco retailers who ship tobacco products. These sections do not apply to delivery carriers, and truckers face no penalties under these provisions. 22 M.R.S.A. § 1555-C(3) ("The following provisions apply to a tobacco retailer shipping tobacco products pursuant to a delivery sale."). To be sure, the provisions do

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[8] In *Flores-Galarza,* the First Circuit interpreted 49 U.S.C. § 41713(b)(4)(A), a parallel provision that contains text identical to 49 U.S.C. § 14501(c)(1) but applies to air rather than motor carriers.

[9] The First Circuit observed that in passing the FAAAA, Congress did not intend to alter the broad preemption interpretation adopted by the United States Supreme Court interpreting a comparable ERISA provision in *Morales,* even though the Supreme Court later stepped back from this expansive preemption interpretation in ERISA cases. *Flores-Galarza,* 318 F.3d at 334 n.17 (citing H.R. Rep. No. 103-240, at 83 (1994), *reprinted in* 1994 U.S.C.C.A.N. 1676, 1755).

force retailers to use delivery carriers that offer certain services. *See* 22 M.R.S.A. § 1555-C(3)(C) (requiring tobacco retailers to use a delivery service that requires the purchaser to be the addressee, the addressee to be of legal age to purchase tobacco products and sign for the package, and, if the addressee is under 27 years old, to present a valid identification showing proof of age); 22 M.R.S.A. § 1555-C(3)(A) (requiring the tobacco retailer, prior to shipping, to provide the delivery service the age of the purchaser). Ultimately that restriction may significantly affect the business of interstate trucking, but that can be determined only by examining the law as it is applied, not by the facial challenge that the truckers have raised in this motion. Sections 1555-C(3)(A) and 1555-C(3)(C) do not facially apply to carriers and do not expressly reference motor carrier prices, routes or services. I therefore conclude that 22 M.R.S.A. §§ 1555-C(3)(A) and 1555-C(3)(C) are not facially preempted by the FAAAA, 49 U.S.C. § 14501(c)(1).[10]

C. Section 1555-D

Section 1555-D "refers to" motor carrier services directly: "A person may not knowingly transport or cause to be delivered to a person in this State a tobacco product purchased from a person who is not licensed as a tobacco retailer in this State, except that this provision does not apply to the transportation or delivery of tobacco products to a licensed tobacco distributor or tobacco retailer." 22 M.R.S.A. § 1555-D. The truckers point out that this

[10] I express no opinion as to whether 22 M.R.S.A. §§ 1555-C(3)(A) and 1555-C(3)(C) may in practice have a forbidden significant effect upon motor carrier prices, routes or services.

provision will require them to ensure that any packages containing tobacco products are delivered only if the shipper is licensed or the packages are addressed to licensed cosignees. Ennis Decl. ¶ 4. Thus, it satisfies one of the criteria that lead to preemption under the First Circuit test. But in determining preemption I must also assume that "the historic police powers of the States [are] not to be superseded by [a] Federal Act unless that was the clear and manifest purpose of Congress." *Greenwood Trust,* 971 F.2d at 823 (citing *Rice v. Santa Fe Elevator Corp.,* 331 U.S. 218, 230, 91 L. Ed. 1447, 67 S. Ct. 1146 (1947)). That is so because the authority to preempt state law is "an extraordinary power . . . that we must assume Congress does not exercise lightly." *Id.* (*citing Gregory v. Ashcroft,* 501 U.S. 452, 460, 115 L. Ed. 2d 410, 111 S. Ct. 2395 (1991)). According to the First Circuit ruling on the parallel FAAAA preemption question for air transport, there is a presumption *against* preemption when Congress legislates in a field that has traditionally been regulated by the states. *Flores-Galarza,* 318 F.3d at 336 (internal citations omitted). *See also Hillsborough County v. Automated Medical Labs., Inc.,* 471 U.S. 707, 715, 85 L. Ed. 2d 714, 105 S. Ct. 2371 (1985) (recognizing presumption that state and local regulation of matters related to health and safety is not invalidated under the Supremacy Clause); *Medtronic, Inc. v. Lohr,* 518 U.S. 470, 485, 135 L. Ed. 2d 700, 116 S. Ct. 2240 (1996); *Rice,* 331 U.S. at 230.

In *Flores-Galarza,* the First Circuit found federal preemption of a Puerto Rico law because the law dealt with air transportation, an area where Congress, not the

states, has had a significant and undisputed presence.[11] *Flores-Galarza,* 318 F.3d at 336. Air transportation was not traditionally regulated by states. In contrast, states have historically regulated the ground transport or delivery of dangerous products, especially to minors in order to protect their health, a traditional state concern. For Maine examples, *see* 17-A M.R.S.A. §§ 554-A, 554-B(2) (2003) (unlawful to deliver handgun to a minor); 28-A M.R.S.A. § 2081 (2003) (unlawful to deliver liquor to a minor). *See also* Wis. Stat. § 961.575 (2003) (unlawful to deliver drug paraphernalia to a minor); Mass. Gen. Laws Ann. ch. 94, § 307C (2004) (permitting establishment of regulations to prevent the sale or delivery of tobacco to minors); 720 Ill. Comp. Stat. 685/4 (2004) (unlawful to deliver tobacco or smoking herbs to minors). Moreover, Congress has explicitly recognized the states' traditional authority to tax the sale and use of tobacco products, *see* 15 U.S.C. § 375 *et seq.* (1997), and has sought to help states collect cigarette taxes, recognizing that interstate shipments to consumers deprived states of large amounts of revenue. S. Rep. No. 644, *reprinted in* 1949 U.S. Code Cong. Service 2158, 2158-59; S. Rep. No. 1147, *reprinted in* U.S.C.C.A.N. 2423, 2423.

Maine enacted its Tobacco Delivery Law with two primary goals: to limit the consumption of tobacco products

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[11] Under the Puerto Rico statute, no interstate carrier transporting any package subject to an excise tax could deliver the package unless the recipient presented a certificate from the Department of the Treasury evidencing payment of the tax. In the alternative, a carrier could prepay the taxes owed, deliver the packages and seek reimbursement. *Flores-Galarza,* 318 F.3d at 326 (citing 13 P.R. Laws Ann. §§ 9066, 9077). Puerto Rico was trying to find an effective way to collect taxes and in doing so created significant burdens on air transportation, resulting in preemption by the FAAAA.

by minors, and to track delivery sales in order to acquire lost tax revenue.[12] *See* 22 M.R.S.A. §§ 1555-B, 1555-C(3), (4); L.D. 1236, Summary (121st Me. Legis. 2003). The law both protects public health and aids in the state's ability to collect taxes on tobacco. Laws concerning the delivery of hazardous substances and the collection of taxes on the sale of tobacco products are historically within the state's police power. This is not a disguised attempt to impose state regulations on interstate trucking. The challenged provisions are not limited to carriers; they prohibit *any* person from knowingly delivering cigarettes purchased from anyone but a licensed retailer. *See* 22 M.R.S.A. § 1555-D. The Maine Tobacco Delivery Law is like a variety of other statutes regulating the transportation and distribution of potentially harmful items, and requiring carriers to conform to state administrative regulations,

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[12] The growing incidence of internet and telephone delivery sales of tobacco products had two negative effects – increased accessibility of tobacco products to minors, and lost tax revenue for the state. *See* Committee File of the Committee on Health and Human Services and Committee on Taxation on "An Act To Regulate the Delivery and Sales of Tobacco Products and To Prevent the Sale of Tobacco Products to Minors" (April 29, 2003). The Maine law requires retailers selling tobacco products in Maine to be licensed. 22 M.R.S.A § 1551-A. Licensed retailers must file reports so that they will be properly taxed, and must use a delivery service that confirms the purchaser/addressee is of legal age to buy tobacco products. *See* 22 M.R.S.A. §§ 1555-C(3), (4). The deliverers are the enforcement mechanism – they can only deliver tobacco products purchased from a licensed retailer (*i.e.*, those retailers who won't sell to minors and who pay taxes). I do recognize that the First Circuit in *Flores-Galarza* found that United Parcel Service, forced to collect excise taxes under the Puerto Rico statute which forbade delivery unless and until a recipient produced a treasury certificate, faced significant delay and additional costs. 318 F.3d at 336. But such significant forbidden effects are not apparent on the face of this Maine statute.

receive state authorization, or limit transport to certain parties.[13]

The truckers argue that the FAAAA's goal to eliminate state regulation included state restrictions on "types of commodities carried," citing a statement in the conference committee report that led to the FAAAA's enactment. Pl.'s Mot. at 8 (*citing* H.R. Conf. Rep. No. 103-677, at 86,

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[13] For Maine examples, *see, e.g.*, 12 M.R.S.A. § 8306 (2003) ("may . . . prohibit the transportation . . . of any forest or shade tree or part of any forest or shade tree . . . capable of supporting a disease or insect infestation. . . ."); 8 M.R.S.A. § 225 (2003) ("No person may transport fireworks in any motor vehicle or in any conveyance except as may be permitted by the rules promulgated by the Commissioner of Public Safety."); 17-A M.R.S.A. § 1118 (2003) ("A person is guilty of illegal importation of scheduled drugs if the person intentionally or knowingly brings, carries or transports a scheduled drug other than marijuana into the State from another state or country. . . ."); 28-A M.R.S.A. § 2073 (2003) ("No person may knowingly transport within the State any liquor: A. With intent to sell the liquor in the State in violation of law; B. With intent that the liquor be illegally sold by any person; or C. With intent to aid any person in illegal sale of liquor."); 28-A M.R.S.A. § 2077 (2003) ("No person other than a wholesale licensee, small brewery licensee or farm winery licensee may transport or cause to be transported malt liquor or wine into the State in a quantity greater than 3 gallons for malt liquor and 4 quarts for wine, unless it was legally purchased in the State."); 7 M.R.S.A. § 3981(2002) (regulating periods of confinement and conditions for transportation of animals); 12 M.R.S.A. §§ 7534, 12354 (2003) ("Common carrier accepting any wild animal or wild bird for transportation shall: 1. CHECK LICENSE. Be satisfied that the person presenting that animal or bird for shipment is the person to whom the hunter's license offered for inspection was issued; 2. AFFIX TAGS. Securely affix any tags and identification required by this chapter; and 3. MAKE RETURNS. Make such returns to the commissioner as he may require."); 17-A M.R.S.A. § 554-B(2) ("A person is guilty of unlawfully transferring a handgun to a minor if that person knowingly transfers a handgun to a person who the transferor knows or has reasonable cause to believe is a minor.").

reprinted in 1994 U.S.C.C.A.N. at 1758).[14] But the same report stated that as of August 1994, Maine was not a jurisdiction that impermissibly regulated prices, routes, and services. H.R. Conf. Rep. No. 103-677, at 86, *reprinted in* 1994 U.S.C.C.A.N. at 1758. (Nor were Alaska, Arizona, Delaware, District of Columbia, Florida, Maryland, New Jersey, Vermont, and Wisconsin.) Many of the Maine statutory provisions regulating the transportation of potentially harmful products were already in affect when Congress passed the FAAAA in 1994. *See, e.g.*, 28-A M.R.S.A. §§ 2073, 2077 (liquor transportation provisions; originally enacted in 1987); 12 M.R.S.A. § 7534 (2003) (requirements for carriers transporting wild animals; originally enacted in 1979). *See also* Wis. Stat. § 29.357 (2003) (provision requiring labeling wild game shipments; originally enacted in 1985); N.J. Stat. § 23:3-33 (2003) (labeling requirements for killed game; enacted pre-1994). Thus, the legislative history does not persuade me that Congress intended to preempt outright that traditional area of state concern. To adopt the truckers' argument would mean that states are foreclosed from regulating or prohibiting the transport of drugs, poached game, or other contraband, an unlikely result.[15] *See Robertson v. State of*

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[14] Although the legislative history indicates that state regulation of the "types of commodities carried" is typical, there is no further discussion of such regulation, and thus I can make no inferences from the legislative history as to what types of restrictions on commodities, if any, Congress meant to preempt. *See* H.R. Conf. Rep. No. 103-677, at 86-87, *reprinted in* 1994 U.S.C.C.A.N. at 1758-59.

[15] The truckers also argue that if Maine prevails, then states can varyingly prohibit or regulate the delivery of junk foods, diet aids, herbal remedies, and the like. Perhaps so; perhaps not. Each such law will have to be evaluated separately.

Washington Liquor Control Bd., 102 Wn. App. 848, 10 P.3d 1079, 1084 (Wash. Ct. App. 2000).

III. CONCLUSION

I conclude that 22 M.R.S.A. § 1555-C(3)(A), 22 M.R.S.A. § 1555-C(3)(C), and 22 M.R.S.A. § 1555-D are not facially preempted by the FAAAA. I therefore DENY the truckers' motion for summary judgment.

The parties shall confer and by March 26, 2004, provide a stipulation of facts for the Court's ruling or, if they are unable to reach a stipulation, request an early conference with the Court to determine how the motion will proceed on the "as applied" challenge.

SO ORDERED.

DATED THIS 6TH DAY OF FEBRUARY, 2004

/s/ D. BROCK HORNBY

UNITED STATES DISTRICT JUDGE

MAINE STATUTES INVOLVED

22 Me. Rev. Stat. § 1555-A

§ 1555-A. Identification cards

A licensee may refuse to sell tobacco to any person who fails to display upon request an identification card issued under Title 29-A, section 1410 or a motor vehicle operator's license bearing the photograph of the operator and issued under Title 29-A.

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22 Me. Rev. Stat. § 1555-B

§ 1555-B. Sales of tobacco products

1. Retail sales. Tobacco products may be sold at retail only in a direct, face-to-face exchange in which the purchaser may be clearly identified and through the mail under procedures approved by the department to provide reliable verification that the purchaser is not a minor. For direct, face-to-face sales, employees who sell tobacco products must be at least 17 years of age. An employee who is at least 17 years of age but less than 21 years of age may sell tobacco products only in the presence of an employee who is at least 21 years of age and is in a supervisory capacity.

2. Sales to minors prohibited. A person may not sell, furnish, give away or offer to sell, furnish or give away a tobacco product to any person under 18 years of age. Tobacco products may not be sold at retail to any person under 27 years of age unless the seller first verifies that person's age by means of reliable photographic identification containing the person's date of birth.

3. Sales through vending machines. Tobacco products may be sold through vending machines according to section 1553-A.

4. Wholesale sales. Tobacco products may be distributed at wholesale without a face-to-face exchange only in the normal course of trade and under procedures approved by the Bureau of Revenue Services to ensure that tobacco products are not provided to any person under 18 years of age.

5. REPEALED. Laws 2003, c. 452, § K-7, eff. July 1, 2004.

5-A. Possession and use of cigarettes, cigarette papers or tobacco products by minors prohibited. Except as provided in subsection 5-B, a person under 18 years of age may not:

A. Purchase, possess or use cigarettes, cigarette papers or any tobacco product;

B. Violate paragraph A after having previously violated this subsection; or

C. Violate paragraph A after having previously violated this subsection 2 or more times.

5-B. Exception to possession by minor. A person under 18 years of age may transport or permit to be transported in a motor vehicle cigarettes, cigarette papers or tobacco products in the original sealed package in which they were placed by the manufacturer if the transportation is in the scope of that person's employment.

5-C. Use of false identification by minors prohibited. A person under 18 years of age may not:

A. Offer false identification in an attempt to purchase a tobacco product or to purchase, possess or use cigarettes, cigarette papers or any other tobacco product;

B. Violate paragraph A after having previously violated this subsection; or

C. Violate paragraph A after having previously violated this subsection 2 or more times.

6. Display of prohibition of sales to juveniles. A dealer or distributor of tobacco products shall post notice of this section prohibiting tobacco and cigarette paper sales to persons under 18 years of age. Notices must be publicly and conspicuously displayed in the dealer's or distributor's place of business in letters at least 3/8 inches in height. Signs required by this section may be provided at cost by the department.

7. Enforcement. Law enforcement officers shall enforce this section. A citizen may register a complaint under this section with the law enforcement agency having jurisdiction. The law enforcement agency may notify any establishment or individual subject to this section of a citizen complaint regarding that establishment's or individual's alleged violation of this section and shall keep a record of that notification.

8. Fines. Violations of this section are subject to fines according to this subsection.

A. A person who violates subsection 1, 2, 3 or 4 commits a civil violation for which a fine of not less than $50 and not more than $1,500, plus court costs, must be adjudged for any one offense. Except pursuant to Title 15, section 3314, the fine may not be suspended.

A-1. An employer of a person who violates subsection 1, 2, 3 or 4 commits a civil violation for which a fine of not less than $50 and not more than $1,500, plus court costs, must be adjudged. The fine may not be suspended.

B. A person who violates subsection 5-A or 5-C commits a civil violation for which the following fines may be adjudged.

1) For a first offense, a fine of not less than $100 and not more than $300 may be imposed. The judge, as an alternative to or in addition to the fine permitted by this subparagraph, may assign the violator to perform specified work for the benefit of the State, the municipality or other public entity or a charitable institution.

2) For a 2nd offense, a fine of not less than $200 and not more than $500 may be imposed. The judge, as an alternative to or in addition to the fine permitted by this subparagraph, may assign the violator to perform specified work for the benefit of the State, the municipality or other public entity or a charitable institution.

3) For all subsequent offenses, a fine of $500 must be imposed and that fine may not be suspended. The judge, in addition to the fine permitted by this subparagraph, may assign the violator to perform specified work for the benefit of the State, the municipality or other public entity or a charitable institution.

C. A person who violates subsection 6 commits a civil violation for which a fine of not less than

$50 and not more than $200 may be adjudged for any one offense.

9. Distribution of fines. Fines and forfeitures collected pursuant to subchapter 1 and this subchapter must be credited as follows: one half to the General Fund and ½ to be deposited in a nonlapsing account of the Maine Criminal Justice Academy for the purpose of providing funds for training and recertification of part-time and full-time law enforcement officers.

10. Affirmative defense. It is an affirmative defense to prosecution for a violation of subsection 1, 2 or 4 that the defendant sold, furnished, gave away or offered to sell, furnish or give away a tobacco product to a person under 18 years of age in reasonable reliance upon a fraudulent proof of age presented by the purchaser.

11. Manner of displaying and offering for sale. Tobacco products may be displayed or offered for sale only in a manner that does not allow the purchaser direct access to the tobacco products. The requirements of this subsection do not apply to the display or offering for sale of tobacco products in multi-unit packages of 10 or more units, in tobacco specialty stores or in locations in which the presence of minors is generally prohibited. This requirement does not preempt a municipal ordinance that provides for more restrictive regulation of the sale of tobacco products.

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22 Me. Rev. Stat. § 1555-C

§1555-C. Delivery sales of tobacco products

The following requirements apply to delivery sales of tobacco products within the State.

1. License required. It is unlawful for any person to accept an order for a delivery sale of tobacco products to a consumer in the State unless that person is licensed under this chapter as a tobacco retailer. The following penalties apply to violations of this subsection.

A. A person who violates this subsection commits a civil violation for which a fine of not less than $50 and not more than $1,500 may be adjudged for each violation.

B. A person who violates this subsection after having been previously adjudicated as violating this subsection or subsection 2, 3 or 4 commits a civil violation for which a fine of not less than $1,000 and not more than $5,000 may be adjudged.

2. Requirements for accepting order for delivery sale. The following provisions apply to acceptance of an order for a delivery sale of tobacco products.

A. When accepting the first order for a delivery sale from a consumer, the tobacco retailer shall obtain the following information from the person placing the order:

(1) A copy of a valid government-issued document that provides the person's name, current address, photograph and date of birth; and

(2) An original written statement signed by the person documenting that the person:

(a) Is of legal age to purchase tobacco products in the State;

(b) Has made a choice whether to receive mailings from a tobacco retailer;

(c) Understands that providing false information may constitute a violation of law; and

(d) Understands that it is a violation of law to purchase tobacco products for subsequent resale or for delivery to persons who are under the legal age to purchase tobacco products.

B. If an order is made as a result of advertisement over the Internet, the tobacco retailer shall request the e-mail address of the purchaser and shall receive payment by credit card or check prior to shipping.

C. Prior to shipping the tobacco products, the tobacco retailer shall verify the information provided under paragraph A against a commercially available database derived solely from government records consisting of age and identity information, including date of birth.

D. A person who violates this subsection commits a civil violation for which a fine of not less than $50 and not more than $1,500 may be adjudged for each violation.

E. A person who violates this subsection after having been previously adjudicated as violating this subsection or subsection 1, 3 or 4 commits a civil violation for which a fine of not less than

$1,000 and not more than $5,000 may be adjudged.

3. Requirements for shipping a delivery sale. The following provisions apply to a tobacco retailer shipping tobacco products pursuant to a delivery sale.

A. Prior to shipping, the tobacco retailer shall provide to the delivery service the age of the purchaser as provided under subsection 2, paragraph A and verified under subsection 2, paragraph C.

B. The tobacco retailer shall clearly mark the outside of the package of tobacco products to be shipped to indicate that the contents are tobacco products and to show the name and State of Maine tobacco license number of the tobacco retailer.

C. The tobacco retailer shall utilize a delivery service that imposes the following requirements:

(1) The purchaser must be the addressee;

(2) The addressee must be of legal age to purchase tobacco products and must sign for the package; and

(3) If the addressee is under 27 years of age, the addressee must show valid government-issued identification that contains a photograph of the addressee and indicates that the addressee is of legal age to purchase tobacco products.

D. The delivery instructions must clearly indicate the requirements of this subsection and must declare that state law requires compliance with the requirements.

E. A person who violates this subsection commits a civil violation for which a fine of not less than $50 and not more than $1,500 may be adjudged for each violation.

F. A person who violates this subsection after having been previously adjudicated as violating this subsection or subsection 1, 2 or 4 commits a civil violation for which a fine of not less than $1,000 and not more than $5,000 may be adjudged.

4. Reporting requirements. No later than the 10th day of each calendar month, a tobacco retailer that has made a delivery sale of tobacco products or shipped or delivered tobacco products into the State in a delivery sale in the previous calendar month shall file with the Department of Administrative and Financial Services, Bureau of Revenue Services a memorandum or a copy of each invoice that provides for each delivery sale the name and address of the purchaser and the brand or brands and quantity of tobacco products sold. A tobacco retailer that meets the requirements of 15 United States Code, Section 375 et seq. (1955) satisfies the requirements of this subsection. The following penalties apply to violations of this subsection.

A. A person who violates this subsection commits a civil violation for which a fine of not less than $50 and not more than $1,500 may be adjudged for each violation.

B. A person who violates this subsection after having been previously adjudicated as violating this subsection or subsection 1, 2 or 3 commits a civil violation for which a fine of not less than $1,000 and not more than $5,000 may be adjudged.

5. Unlawful ordering. It is unlawful to submit ordering information for tobacco products by delivery sale under subsection 2, paragraph A in the name of another person. A person who violates this subsection commits a civil violation for which a fine of not more than $10,000 may be adjudged.

6. Rulemaking. The department and the Department of Administrative and Financial Services shall adopt rules to implement this section. Rules adopted pursuant to this subsection are routine technical rules as defined in Title 5, chapter 375, subchapter 2-A.

7. Forfeiture. Any tobacco product sold or attempted to be sold in a delivery sale that does not meet the requirements of this section is deemed to be contraband and is subject to forfeiture in the same manner as and in accordance with the provisions of Title 36, section 4372-A.

8. Enforcement. The Attorney General may bring an action to enforce this section in District Court or Superior Court and may seek injunctive relief, including a preliminary or final injunction, and fines, penalties and equitable relief and may seek to prevent or restrain actions in violation of this section by any person or any person controlling such person. In addition, a violation of this section is a violation of the Maine Unfair Trade Practices Act.

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22 Me. Rev. Stat. § 1555-D

§1555-D. Illegal delivery of tobacco products

A person may not knowingly transport or cause to be delivered to a person in this State a tobacco product purchased from a person who is not licensed as a tobacco retailer in this State, except that this provision does not apply to the transportation or delivery of tobacco products to a licensed tobacco distributor or tobacco retailer. A person is deemed to know that a package contains a tobacco product if the package is marked in accordance with the requirements of section 1555-C, subsection 3, paragraph B or if the person receives the package from a person listed as an unlicensed tobacco retailer by the Attorney General under this section.

1. Lists. The Attorney General shall maintain lists of licensed tobacco retailers and known unlicensed tobacco retailers. The Attorney General shall provide to a delivery service lists of licensed tobacco retailers and known unlicensed tobacco retailers. The list of known unlicensed tobacco retailers is confidential. A delivery service that receives a list of known unlicensed tobacco retailers shall maintain the confidentiality of the list.

2. Penalty. The following penalties apply for violation of this section.

A. A person who violates this section commits a civil violation for which a fine of not less than $50 nor more than $1500 may be adjudged for each violation. A fine imposed under this paragraph may not be suspended.

B. An employer of a person who, while working and within the scope of that person's employment, violates this section commits a civil violation for

which a fine of not less than $50 nor more than $1,500 may be adjudged for each violation. A fine imposed under this paragraph may not be suspended.

3. Enforcement. The Attorney General may bring an action to enforce this section in District Court or Superior Court and may seek injunctive relief, including a preliminary or final injunction, and fines, penalties and equitable relief and may seek to prevent or restrain actions in violation of this section by any person or any person controlling such person. In addition, a violation of this section is a violation of the Maine Unfair Trade Practices Act.

4. Affirmative defense. It is an affirmative defense to a prosecution under this section that a person who transported tobacco products or caused tobacco products to be delivered reasonably relied on licensing information provided by the Attorney General under this section.

5. Rulemaking. The department shall adopt rules to implement this section. Rules adopted pursuant to this subsection are routine technical rules as defined in Title 5, chapter 375, subchapter 2-A.

6. Forfeiture. Any tobacco product sold or attempted to be sold in a delivery sale that does not meet the requirements of this section is deemed to be contraband and is subject to forfeiture in the same manner as and in accordance with the provisions of Title 36, section 4372-A.

AMER RECORDS AND BRIEFS

No. 06-457

Supreme Court, U.S.
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In The
Supreme Court of the United States

G. STEVEN ROWE, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF THE STATE OF MAINE,

Petitioner,

v.

NEW HAMPSHIRE MOTOR TRANSPORT ASSOCIATION, MASSACHUSETTS MOTOR TRANSPORTATION ASSOCIATION, INC., AND VERMONT TRUCK & BUS ASSOCIATION, INC.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

PAUL T. FRIEDMAN
RUTH N. BORENSTEIN
LAWRENCE R. KATZIN
MORRISON & FOERSTER LLP
425 Market Street
San Francisco, CA 94105-2482
Tel.: (415) 268-7000
Fax: (415) 268-7522

BETH S. BRINKMANN
Counsel of Record
MORRISON & FOERSTER LLP
2000 Pennsylvania Avenue, NW
Washington, DC 20006-1888
Tel.: (202) 887-1544
Fax: (202) 887-0763

Counsel for Respondents

November 29, 2006

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QUESTION PRESENTED

Whether provisions of the Maine Tobacco Delivery Law that regulate whether and how cargo carriers may provide transportation and delivery services for tobacco products are "law[s] related to a price, route, or service" of such carriers and, therefore, fall within the preemption provisions of the Federal Aviation Administration Authorization Act of 1994 (FAAAA), 49 U.S.C. §§ 14501(c)(1) & 41713(b)(4)(A).

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

None of the respondents, the New Hampshire Motor Transport Association, the Massachusetts Motor Transportation Association, Inc., or the Vermont Truck & Bus Association, Inc., has a parent corporation and no publicly-held company owns 10% or more of the stock of any of the respondents.

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STATEMENT

1. The Federal Aviation Administration Authorization Act of 1994 (FAAAA). Through the preemption provisions of the FAAAA, Congress has provided that "a State * * * may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service" of any motor carrier, air carrier, or intermodal air/ground carrier with respect to the transportation of property. FAAAA, Pub. L. No. 103-305, Title VI, § 601(b)-(c), 108 Stat. 1569, 1605-1606 (1994) (currently codified at 49 U.S.C. § 14501(c)(1) (motor carriers); 49 U.S.C. § 41713(b)(4)(A) (air and intermodal carriers)).

In enacting the FAAAA, Congress expressly found that state regulation of the transportation of property had "imposed an unreasonable burden on interstate commerce [and] impeded the free flow of trade, traffic, and transportation of interstate commerce." *Id.* § 601(a)(1)(A)-(B), 108 Stat. at 1605. Congress enacted the FAAAA preemption provisions to free all air, motor, and intermodal cargo carriers from a "patchwork of regulation" by the several States. H.R. Conf. Rep. No. 103-677, at 87 (1994), *reprinted in* 1994 U.S.C.C.A.N. 1715, 1759. The House Conference Report explained: "The sheer diversity of [state] regulatory schemes is a huge problem for national and regional carriers attempting to conduct a standard way of doing business." *Ibid.* In particular, state restrictions on the "*types* of commodities carried" were identified as a form of state regulation that had interfered with the ability of carriers to provide uniform services. *Id.* at 86 (emphasis supplied).

2. The Maine Tobacco Delivery Law. The provisions of Maine law at issue in this action were enacted as part of "An Act to Regulate the Delivery and Sales of Tobacco Products and To Prevent the Sale of Tobacco Products to Minors" (Maine Tobacco Delivery Law). 2003 Me. Laws 444.

Section 1555-D of that Act, entitled the "Illegal Delivery of Tobacco Products," has two components: One prohibits the "knowing[ ] transport[ation]" of tobacco

products "purchased from a person who is not licensed as a tobacco retailer" in Maine to anyone in Maine other than a licensee. Me. Rev. Stat. Ann. tit. 22, § 1555-D. The other component provides that a person is "deemed to know that a package contains a tobacco product" if the package is marked as containing tobacco or if the shipper of the package is "listed as an unlicensed tobacco retailer" by the Maine Attorney General.[1] *Ibid.* The Attorney General maintains lists of licensed tobacco retailers and known unlicensed tobacco retailers in order to provide those lists "to a delivery service." *Id.* § 1555-D(1).[2]

Another provision of the state law, Section 1555-C(3)(C) addresses the manner in which a delivery service – i.e., a commercial carrier of property – must provide its service in order to comply with the requirements of Maine law governing "delivery sales" of tobacco products. *Id.* § 1555-C(3)(C). Under Maine law, a "delivery sale" of tobacco products occurs whenever there is a sale "to a consumer in [Maine] when * * * [t]he tobacco products are delivered by use of a delivery service." *Id.* § 1551(1-B)(B). Section 1555-C(3)(C) requires that, when "shipping" a delivery sale, the seller must use a delivery service that imposes the following requirements: "(1) the purchaser must be the addressee; (2) the addressee must be of legal age to purchase tobacco products and must sign for the package"; and (3) an addressee under twenty-seven years of age "must show valid government-issued identification" that establishes the addressee to be of legal age to purchase tobacco products. *Id.* § 1555-C(3)(C).

[1] Although petitioner describes Section 1555-D as prohibiting carriers from "delivering tobacco products to children" (Pet. 14), that provision actually prohibits transportation and delivery of tobacco products purchased from unlicensed retailers (unless the recipient itself is a Maine licensee) without regard to whether the delivery is to a minor.

[2] A "[d]elivery service" is a commercial carrier of property, i.e., "a person * * * who is engaged in the commercial delivery of letters, packages or other containers." Me. Rev. Stat. Ann. tit. 22, § 1551(1-C).

The Maine Tobacco Delivery Law also provides other means of regulating delivery sales of tobacco, such as licensing, age verification, and reporting requirements for vendors, and restrictions on forms of payment. *Id.* §§ 1555-C(1)-(2), 1555-C(3)(B), 1555-C(4). Respondents did not challenge these additional requirements and the court of appeals below held only that Section 1555-C(3)(C) and the imputed knowledge component of Section 1555-D are preempted. Pet. App. 22-28.

3. Effects of the challenged provisions on commercial carriers. Respondents, which are trade associations of commercial carriers of property, demonstrated the effects of Section 1555-C(3)(C) and Section 1555-D on carriers' transportation and delivery services through uncontroverted evidence provided by their member UPS.

Each of the provisions of the Maine Tobacco Delivery Law that the court of appeals held preempted has a significant effect on UPS's transportation and delivery services. Section 1555-C(3)(C) mandates that tobacco retailers use carriers that require *the addressee* to sign for the packages. UPS's standard nationwide service, however, is to deliver to mail room attendants, receptionists, or other persons (or on request, other adults) at the delivery address. If UPS delivery drivers made personal delivery only to addressees, drivers would have to spend considerably more time at delivery stops in order to determine whether the named addressee was available and, if so, then to wait for that person to sign for the package. Pet. App. 64-65. Also, requiring carriers to identify the contents of a package to determine if special delivery procedures are required, and then to implement those procedures for deliveries of tobacco products, "causes carriers' drivers to alter their delivery practices for packages in Maine containing tobacco products, and can delay delivery of the package with tobacco products and subsequently delivered packages." *Ibid.* Accordingly, UPS determined that complying with Section 1555-C(3)(C) "would not be feasible" and "stopped delivering all tobacco products to Maine consumers." *Id.* at 5.

UPS must further alter its transportation and delivery services in order to comply with Section 1555-D by: (1) looking for markings regarding the package contents and reading names of the addressee and/or shipper for indications that a package contains tobacco products; (2) researching whether the addressee of an identified package is a Maine licensee; and (3) preventing delivery of any such package shipped to an unlicensed recipient. *Id.* at 56-57; *see also id.* at 5-6.[3]

UPS now maintains a nationwide policy of prohibiting shipments of cigarettes for delivery to consumers. But even that blanket policy would be insufficient under Maine law if the challenged provisions were not preempted. UPS would face penalties if it failed to intercept a package shipped in violation of its cigarette policy or if it transported and delivered non-cigarette tobacco products from unlicensed retailers. The court of appeals correctly held, however, that the FAAAA preempts the challenged provisions and precludes such penalties.

REASONS WHY THE PETITION SHOULD BE DENIED

This case involves express preemption by a federal statute of state laws that are "related to a [cargo carrier's] price, route, or service," including the provisions of the Maine Tobacco Delivery Law at issue here, which regulate whether and how carriers may lawfully transport and

[3] Petitioner erroneously asserts that UPS incurred costs of researching only thirty-three packages believed to contain tobacco products. Pet. 11. The record established that UPS had determined that thirty-three of the packages it had researched were undeliverable; however, the costs of research are incurred as to every package that is identified as containing tobacco products, not just for packages determined to be undeliverable. *See* Statement Of Undisputed Material Facts In Support Of Plaintiffs' "As Applied" Motion For Summary Judgment ¶ 90; Plaintiffs' Opposition To Defendant's Statement Of Undisputed Material Facts In Support Of Motion For Summary Judgment, Including Plaintiffs' Additional Undisputed Material Facts ¶ 126.

deliver tobacco products in Maine. The court below correctly held that the challenged provisions of Maine law imposed substantial burdens on carriers' transportation and delivery services for all packages shipped to Maine, regardless of their content, and thus unquestionably were "related to" carriers' service and could not survive federal preemption under the FAAAA.

There is no reason for this Court to grant review. The court of appeals' ruling is in accord with, and in fact relies upon, the few federal district courts and state courts that have addressed this issue, and petitioner's proffered split of circuit authorities does not exist. Neither of the circuit authorities petitioner cites is germane to the instant dispute. Rather, those rulings involve generally applicable prevailing wage laws and local regulation of tow truck safety and insurance, not laws explicitly directed to the manner in which carriers provide transportation and delivery services. Indeed, the absence of any conflict is made plain by the fact that petitioner has not demonstrated, and cannot demonstrate, that the decision below would be any different had it arisen in either of the other federal courts of appeals he cites.

Review here is particularly inappropriate because petitioner failed to raise adequately below an issue he now deems a critical justification for *certiorari*. Petitioner contends that the decision below leaves Maine defenseless against the delivery of tobacco products to minors. But the record below is barren on that issue, because petitioner proffered no evidence on the issue and, in fact, resisted respondents' discovery as to issues concerning enforcement of the Maine law. Moreover, petitioner's claim fails to account for other means of regulating delivery sales of tobacco that were not challenged by respondents and that remain in force.

In all events, petitioner has not overcome the fact that the state law at issue here unquestionably relates to carriers' transportation and delivery services, in direct contravention of the FAAAA. Commercial transportation of property is vital to the United States economy, as for-hire

motor and air carriers annually transport more than 3.5 billion tons of goods, valued in excess of $4 trillion. In this highly competitive market, carriers stake their reputations on the prompt and efficient delivery of packages because customers judge carriers by their efficiency, price, and service. To reliably and efficiently deliver packages for its customers, carriers such as UPS depend on uniform package-handling processes and procedures for picking up, processing, handling, and delivering packages traveling within the United States, regardless of the State that is the destination. Pet. App. 51. UPS's "delivery operations function as an integrated system, requiring extensive planning and coordination among its operating facilities and ground and air fleet. Delays and disruptions in the sorting and delivery of packages can affect the timely delivery of thousands of packages within the UPS system." *Id.* at 5. The FAAAA was explicitly enacted to free and protect this uniform system of operations from the application of divergent state laws. As discussed below, the Maine law undermines this federal goal by imposing its state law requirements, nowhere contemplated under the FAAAA, that have substantially affected carriers' transportation and delivery services for all shipments within and to Maine.

A. THERE IS NO CONFLICT IN THE LOWER COURTS AS TO THE PREEMPTIVE EFFECT OF THE FAAAA ON STATE TOBACCO LAWS THAT EXPRESSLY REGULATE CARRIERS' TRANSPORTATION AND DELIVERY OF GOODS

1. The Purported Disagreement Between The Decision Below And Rulings Of The Ninth And Second Circuits Is Illusory

The court of appeals, using well-settled federal preemption principles, properly concluded that the FAAAA preempts portions of the Maine Tobacco Delivery Law that regulate whether and how carriers may lawfully provide transportation and delivery services for tobacco products

shipped to recipients in Maine. *See* Pet. App. 21-29. Petitioner attempts to place that ruling in some type of conflict with the precedent of other circuits (Pet. 25-27), but does so by citing FAAAA preemption cases that do not involve state laws that regulate or affect carriers' transportation or delivery services. And in no manner does petitioner demonstrate that the standards applied in those other cases are in conflict with or would lead to a different result in this case.

a. The state laws at issue in the decisions of the Ninth and Second Circuits did not regulate a carrier's transportation or delivery of goods

Maine's Tobacco Delivery Law expressly and directly regulates carriers' transportation and delivery services by prohibiting certain deliveries of tobacco products and dictating the manner in which carriers must make deliveries in order to lawfully deliver tobacco products to consumers in Maine. The Maine law regulates core carrier services – transportation and delivery – and contradicts Congress's expressed concern to permit carriers to have uniform nationwide service to ensure the free flow of goods in interstate commerce. *See* page 1, *supra*. The uncontroverted record established that the challenged provisions have significant effects on carriers' services, including causing one carrier to abandon the service of making lawful deliveries of tobacco products to unlicensed recipients in Maine.

By contrast, the decisions that petitioner invokes in his attempt to create a circuit conflict do not involve regulation of carriers' transportation or delivery services. The Ninth Circuit's decision in *Californians for Safe & Competitive Dump Truck Transportation v. Mendonca*, 152 F.3d 1184 (9th Cir. 1998), *cert. denied*, 526 U.S. 1060 (1999), addressed an FAAAA preemption challenge to a generally applicable state prevailing *wage* law that required all public works contractors to pay their workers no less than the prevailing rate for similar work in the locality where the public work was performed. *See* 152

F.3d at 1186. The wage law at issue did not regulate carriers' transportation or delivery services in any manner and thus is inapposite to the instant dispute. In fact, the court of appeals explicitly held that the statute was *not* "related to" the contractors' prices, routes, and services within the meaning of the FAAAA because "the effect [of wage laws] is no more than indirect, remote, and tenuous." *Id.* at 1189.

Likewise, the Second Circuit in *Ace Auto Body & Towing, Ltd. v. City of New York*, 171 F.3d 765 (2d Cir. 1999), *cert. denied*, 528 U.S. 868 (1999), considered FAAAA preemption in the context of the local regulation of tow truck "chasing," in which tow trucks monitor accident reports on police radios and then race each other to the scene in hopes of obtaining towing and repair business. *Id.* at 769. Thus, that case did not involve a carrier's transportation or delivery of goods. Indeed, *Ace Auto* did not address the scope of the FAAAA preemption provisions at all, as the parties agreed that the FAAAA "generally preempts state and local regulation of the intrastate towing industry." *Id.* at 771. Instead, the issue presented was whether the regulations at issue fell within the FAAAA savings clauses regarding motor vehicle safety and insurance requirements. *Id.* at 772; *see id.* at 774-775 (holding that savings clauses applied). Because those savings clauses do not apply here, there is no reason to believe that the Second Circuit would reach a different holding concerning Maine's regulation of deliveries than did the First Circuit.

b. Petitioner has not shown that this case would have a different result in a different circuit

The absence of any conflict between the decision below and the rulings of the Ninth and Second Circuits is underscored by petitioner's failure to demonstrate that the application of those decisions to the instant dispute would have made any difference. Petitioner purports to discern a conflict based on different standards applied by

the courts' interpretation of the scope of the term "related to" within the meaning of the FAAAA. Petitioner notes that the court of appeals in the instant case relied on *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374 (1992), which interpreted the virtually identical preemption provision of the Airline Deregulation Act of 1978, while the Ninth and Second Circuits relied on this Court's post-*Morales* decisions that narrowed the scope of "related to" in the preemption provision of the Employee Retirement Income Security Act (ERISA), 29 U.S.C. § 1144(a).[4] Petitioner's argument ignores the fact that the *Morales* standard is appropriate for FAAAA preemption (*see* page 19, *infra*).

In any event, any purported difference in the standards pertaining to the proper scope of "related to" for purposes of the FAAAA is irrelevant to the resolution of this case because Maine's regulation of carriers' deliveries would be preempted even under the standard articulated in this Court's ERISA decisions. This Court has held that a "law 'relates to' a covered employee benefit plan for purposes of [ERISA preemption] if it [1] has a connection with or [2] a reference to such a plan." *California Div. of Labor Standards Enforcement v. Dillingham Constr., N.A., Inc.*, 519 U.S. 316, 324 (1997) (citation and internal quotation marks omitted, alterations in original). The court below applied an analogous test with respect to both prongs of this standard.

1. The court below held that the challenged provisions of the Maine Tobacco Delivery Law would be preempted if they "either expressly *reference* carrier services or have a forbidden significant effect on UPS' services." Pet. App. 22 (emphasis supplied). This standard is in accord with the reference requirement under the ERISA "related to" provision. Adapting the ERISA standard to the FAAAA, a "reference" exists, and a state law is thus

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[4] The Second Circuit's citation of ERISA cases in *Ace Auto* is inapposite because the court merely cited those cases as precedent that "[g]uided" its analysis of the FAAAA *savings clauses*, 171 F.3d at 774, not for purposes of determining whether particular state laws are "related to" a carrier's price, route, or service.

preempted, where the state law "acts immediately and exclusively upon [a commercial carrier's price, route, or service] * * * or where the existence of [a commercial carrier's price, route, or service] is essential to the law's operation." *Dillingham*, 519 U.S. at 324-335.

There can be no dispute that application of the ERISA "reference" standard to this case would make no difference. The challenged Maine law expressly seeks to "Regulate the Delivery * * * of Tobacco Products" in Maine. 2003 Me. Laws 444. In fact, the challenged provisions are replete with express references to transportation and delivery services. Section 1555-D defines and proscribes the "Illegal Delivery of Tobacco Products" and makes it unlawful for a person to "knowingly *transport or cause to be delivered*" certain shipments of tobacco products. Me. Rev. Stat. Ann. tit. 22, § 1555-D (emphasis added); *see also id.* § 1555-D(1) (explicitly referencing carriers in requiring the Attorney General to provide lists of licensed and known unlicensed tobacco retailers to "a delivery service"). Section 1555-C(3)(C) also expressly refers to carriers (i.e., delivery services) and the service they provide, requiring that a "delivery sale" of tobacco products – i.e., a sale "delivered by use of a delivery service" (*id.* § 1551(1-B)(B)) – must be shipped via "a delivery service that imposes" specified "requirements," including requiring that the purchaser sign for the shipment. *Id.* § 1555-C(3)(C). This express regulation of carriers' delivery services unquestionably satisfies the "reference" inquiry applied in ERISA cases because the existence of carriers' delivery service "is essential to the law's operation." *Dillingham*, 519 U.S. at 325.

2. Likewise, the application of the ERISA preemption test for whether a State law "has a connection with" an ERISA plan, *Dillingham*, 519 U.S. at 324, would lead to preemption here. As the *Dillingham* Court explained, "to determine whether a state law has the forbidden connection, we look both to 'the objectives of the ERISA statute as a guide to the scope of the state law that Congress understood would survive,'" and "to the nature of the effect of the state law on ERISA plans." *Id.* at 325 (citing *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 656, 658-659 (1995)).

Assuming this standard were applicable to the FAAAA with regard to the preemption of state regulation of a cargo carrier's price, route, or service, the court of appeals below did not depart from it. The court looked at the "structure and legislative history" of the FAAAA to discern Congress's intended scope of preemption (Pet. App. 17; *see id.* at 13-14 (citing *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996))), and concluded that the challenged provisions were inconsistent with Congress's intent. *See id.* at 17-21.

The challenged provisions of the Maine Tobacco Delivery Law also have a sufficient "connection with" transportation and delivery service to satisfy ERISA standards.[5] By dictating whether, to whom, and how carriers may provide transportation and delivery services for tobacco products, the Maine provisions "function as a regulation of" carrier services, and trigger federal preemption. *Cf. Travelers*, 514 U.S. at 659.

Accordingly, even if there were disagreement between the federal courts of appeals, this Court should await a better vehicle in which to consider such issues, including where the application of a new standard would make a difference to the outcome of the case. Petitioner has no basis to contend that the Ninth or Second Circuits would

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[5] In applying the "connection with" test under ERISA, the Court has held that a statute that "binds ERISA plan administrators to a particular choice of rules" is preempted under the "connection with" test. *Egelhoff v. Egelhoff*, 532 U.S. 141, 147 (2001). In contrast, laws that have only an "indirect economic influence" on ERISA plans but do not "bind plan administrators to any particular choice and thus function as a regulation of an ERISA plan itself" do not have a sufficient connection with ERISA plans to trigger preemption. *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 659 (1995); *see also Dillingham*, 519 U.S. at 332, 334 ("prevailing wage statute does not bind ERISA plans to anything" and merely "alters the incentives, but does not dictate the choices, facing ERISA plans").

reach a different result in this case based on their citation of post-*Morales* ERISA cases.[6]

2. The District Court And Intermediate State Appellate Court Decisions Cited By Petitioner Do Not Justify Further Review

Petitioner also cites to district court and intermediate state appellate court opinions, including an unpublished disposition. But these rulings create no conflict and, if anything, reinforce the fact that this Court should allow the issue to percolate until other federal circuit courts and state courts of last resort have had the opportunity to meaningfully analyze and decide the issue.

Indeed, petitioner's reliance upon these decisions is ironic because the First Circuit cited them in its opinion below as consistent with its holding that the portion of Section 1555-D that prohibits the knowing delivery of contraband tobacco products is not preempted. Pet. App. 26-27. The difference in result between those cases and the First Circuit's holding that the imputed knowledge provision of Section 1555-D is preempted is due solely to the application of the law to different *facts*, not the

[6] In addition to the ERISA preemption standard, petitioner relies on the Ninth Circuit's treatment of the FAAAA's legislative history. Petitioner cites the Ninth Circuit's "perception" that Congress did not intend to preempt state prevailing wage laws based on the existence of such laws in ten jurisdictions that Congress did not identify in the legislative history as among those that regulated carriers' prices, routes and services, and the absence of any affirmative indication of Congress's intent to preempt in this "area of traditional state power." *Mendonca*, 152 F.3d at 1188-1189; *see* Pet. 26. Petitioner contends that the court of appeals in the instant case "ignored" that Maine was not identified as a State that regulated carriers' prices, routes, and services, and that Maine had enacted laws regulating deliveries of substances such as wild birds and animals. (Pet. 26; *see id.* at 4 n.1.) The different weight given to one aspect of legislative history by different courts does not create a conflict warranting review by this Court, particularly where, as here, the lower courts were evaluating dissimilar statutes and, as shown above, the standard applied by the purportedly conflicting court would lead to the same result.

application of any legal standard that is different from that of the First Circuit. As such, none of these decisions creates a conflict, much less one worthy of review by this Court.

For example, the unpublished district court decision, *New York State Motor Truck Association v. Pataki*, No. 03-CV-2386, 2004 WL 2937803 (S.D.N.Y. Dec. 17, 2004), addressed a facial challenge to a New York statute that prohibits the knowing delivery of cigarettes to unauthorized recipients, which is similar to the delivery ban set forth in Section 1555-D. Contrary to petitioner's claim, the district court in *New York State Motor Truck Association* did not categorically conclude that there could be no preemption. The court explicitly recognized that carriers might have "to alter their standard way of doing business" to comply with the state law and that such an effect could trigger application of FAAAA preemption. 2004 WL 2937803, at *9. The court declined to find preemption in deciding the particular motion before it, however, because there was no evidence of the statute's effects at that stage of the litigation. *Ibid.* Here, by contrast, the First Circuit relied on evidence of the effects on UPS's services of the imputed knowledge portion of Section 1555-D to hold that portion of the statute preempted.

Petitioner's reliance upon *Ward v. State of New York*, 291 F. Supp. 2d 188 (W.D.N.Y. 2003), is similarly unpersuasive. In that decision, the district court denied a motion for a temporary restraining order and preliminary injunction against enforcement of the same New York statute at issue in *New York State Motor Truck Association*. Thus, on the record before that court, in a proceeding requiring satisfaction of a likelihood of success on the merits standard, the district court found that the plaintiffs had not met their burden. Such a fact-bound determination does not create a conflict of *legal* authorities. Moreover, *Ward* was filed by Indian tribe members involved in the sale of cigarettes and presented *sui generis* issues regarding Tribal sovereignty and Indian rights that are wholly inapposite here. *See* 291 F. Supp. 2d at 196-207.

Finally, petitioner's citation to *Robertson v. Washington State Liquor Control Board*, 10 P.3d 1079 (Wash. Ct. App. 2000), is irrelevant. There, the court held that the FAAAA did not preempt State excise tax statutes that prohibited transportation of contraband untaxed cigarettes and allowed the forfeiture of vehicles used in such transportation. That result is fully consistent with the First Circuit's ruling that the FAAAA does not preempt the portion of Section 1555-D that prohibits the knowing delivery of contraband tobacco products. There apparently was no question of imputed knowledge in *Robertson*, as the plaintiff in that case had "personally hauled" 28,900 cartons of untaxed, unstamped cigarettes into the State on behalf of an Indian Tribe. 10 P.3d at 1081. Likewise, there was no issue regarding effects on carriers' services of imputed knowledge as to the contents of a package, which was the basis for the First Circuit's ruling as to the portion of Section 1555-D that it held preempted.

B. REVIEW IS INAPPROPRIATE BECAUSE PETITIONER'S CLAIM THAT MAINE HAS NO EFFECTIVE MEANS TO COMBAT MINORS' ACCESS TO TOBACCO IS NOT SUPPORTED BY THE RECORD BELOW AND IGNORES AVAILABLE MEANS OF REGULATING TOBACCO SELLERS

Petitioner claims that review is warranted because the First Circuit's decision "leaves delivery sales of tobacco to children unregulated by any government." Pet. 16. That argument does not justify review because it is not supported by the record and also is contradicted by common sense and the assertions of petitioner's own *amici*.

1. The record below is insufficient to support petitioner's claim that the State of Maine is left without an effective means to combat minors' access to tobacco products, making this case a poor vehicle to address the issues raised in the petition for a writ of *certiorari*. Indeed,

the record in this case is devoid of any evidence as to the effectiveness of Maine's regulation of carriers' transportation and delivery services, either absolutely or relative to other means of regulating delivery sales of tobacco products (such as evidence of any decline in delivery sales to minors when the regulations of carriers were put in place).

The inadequate record is due to petitioner's failure to submit evidence on the issue, as well as his resistance to respondents' discovery, including his objections to deposition notices and subpoenas directed to Maine agencies seeking testimony about "efforts * * * made to enforce" or "consideration * * * given to enforcing" the challenged provisions, on the ground that such discovery would invade the "law enforcement deliberative process."[7] As a result, there is no evidence in the record that could support a conclusion that the preempted portions of the Maine law are *necessary* to protect the interests of such minors.

2. In any event, petitioner's argument fails to account for other means of regulating delivery sales of tobacco that are provided in the Maine Tobacco Delivery Law itself. Respondents do not challenge portions of the Maine law that require delivery sale retailers (1) to be licensed; (2) to obtain age verification from purchasers in the form of a copy of a valid government-issued document and to verify that information against a database of government records; (3) to obtain payment by credit card or check if a sale is the result of an Internet advertisement; (4) to mark packages as containing tobacco products; and (5) to report delivery sales to the Maine Bureau of Revenue Services. Me. Rev. Stat. Ann. tit. 22, §§ 1555-C(1)-(2), 1555-C(3)(B),

[7] Petitioner's objections to providing the requested witnesses ultimately were resolved by petitioner's stipulation that the State was enforcing and would continue to enforce the challenged provisions of the Tobacco Delivery Law, and that there was an immediate threat of enforcement "for any carrier coming into the State of Maine." Report of Telephone Conference and Order, July 15, 2004 (Kravchuk, M.J.).

1555-C(4). Respondents also do not challenge the provision of the Tobacco Delivery Law that makes it unlawful to submit required information for a delivery sale in the name of another person. *Id.* § 1555-C(5). Nothing in the First Circuit's decision prevents enforcement of these requirements.[8]

Petitioner thus fails to demonstrate a need for review because he has not shown that Maine's other existing regulations of retailers and purchasers are unenforceable or ineffective, particularly where he has failed to demonstrate the necessity of the preempted provisions. By their very terms, the regulations that are not challenged could be enforced by review of tobacco sellers' websites to determine whether unlicensed sellers offer to sell tobacco products to Maine residents, and sting operations to order tobacco products from such sellers to determine if they comply with the non-preempted state regulations. Indeed, the *amicus curiae* brief submitted by other States reports that California conducted just such an investigation in which children visited web sites in order to attempt to purchase tobacco products. Br. of California and 35 Other States as *Amici Curiae* 3. Nothing prevents Maine from conducting similar investigations and taking enforcement actions against retailers engaged in unlawful delivery sales who, unlike carriers, know the contents of the packages they ship.[9]

To the extent that petitioner believes that state regulation of carriers' transportation and delivery services

[8] The *amici* States' assertion that prohibiting the imputation of knowledge to *carriers* somehow limits States' ability to prosecute *sellers* of tobacco products is unexplained and illogical. Br. of California and 35 Other States as *Amici Curiae* 6.

[9] The *amici* brief of other States also reports that, in California's investigation, nearly 50% of online vendors thwarted underage purchasers who attempted to purchase a carton of cigarettes from their sites. Br. of California and 35 Other States as *Amici Curiae* 3. Maine is free to further regulate online vendors to mandate that they follow the effective methods used by those vendors who successfully thwarted underage purchases.

is essential to combating delivery sales of tobacco products to minors, the decision below permits enforcement against carriers of Section 1555-D's prohibition against knowing deliveries of tobacco products from unlicensed shippers. Pet. App. 24-26. The court of appeals held preempted only the provision of Section 1555-D that imputed knowledge from the shipper's appearance on a list of unlicensed retailers or from markings on a package. *Id.* at 27-28. Petitioner's assertion that imputed knowledge is the only way to prove a carrier's knowing delivery in violation of Maine's Tobacco Delivery Law is without support in the record. Indeed, in the *Robertson* case on which petitioner relies, the State of Washington was able to prove that a trucker transported contraband cigarettes based on his having "personally hauled" those cigarettes, without relying on imputed knowledge. 10 P.3d at 1081.

3. Finally, for the same reasons that petitioner fails to show that he has been left unable to regulate delivery sales of tobacco products, his assertions about his claimed inability to regulate other products (Pet. 16) also lack support and are nowhere presented in this dispute.

This case is not a proper vehicle to review the complex issues presented when States attempt to regulate interstate transportation of *any* commodity. Petitioner fails to acknowledge the limits on the States' role in regulating interstate commerce. *See, e.g.*, *Louisville & Nashville R.R. v. F.W. Cook Brewing Co.*, 223 U.S. 70, 82-83 (1912) ("it is not competent for any State to forbid any common carrier to transport" any commodity that is the "legitimate subject of interstate commerce" because such regulation would be "an unlawful regulation of interstate commerce not authorized by the police power of the State"). Petitioner's reliance on *Granholm v. Heald*, 544 U.S. 460 (2005), is misplaced because that case involved the constitutional authority of the States, pursuant to the Twenty-first Amendment, to regulate the transportation of alcohol. U.S. Const. amend. XXI, § 2. That case did not present a question as to the States' authority to regulate carriers that transport and deliver tobacco and did not address FAAAA preemption of state laws that relate to

carriers' transportation and delivery services. Issues regarding deliveries of other products simply are not presented in this case.

In short, the record below does not support petitioner's assertions that regulating carriers is the only means to limit delivery sales of tobacco products to minors, or even that it is the most effective means. Although it may be easier for Maine to conscript carriers to be the enforcement mechanism for its regulation of tobacco delivery sales, rather than to conduct its own enforcement efforts, Congress has reserved for itself the role of assessing burdens on interstate commerce to determine when to regulate the services of carriers of property. To the extent that Maine has policy arguments about its desire to regulate carriers' services in order to restrict delivery sales of tobacco products, those arguments should be addressed to Congress, which has considered but rejected such regulations in the recent past, rather than the courts.[10]

C. THE FIRST CIRCUIT CORRECTLY HELD THAT THE FAAAA PREEMPTS MAINE'S REGULATION OF CARRIERS' SERVICES

1. Section 1555-C(3)(C) And The Imputed Knowledge Provision Of Section 1555-D Are Related To Carriers' Transportation And Delivery Services

In all events, the First Circuit correctly applied the test used in *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374 (1992), which interpreted the virtually identical preemption provision of the Airline Deregulation Act, currently codified at 49 U.S.C. § 41713(b)(1), to determine whether the challenged provisions of the Maine Tobacco

[10] Indeed, to the extent that petitioner's *amici* believe that a "comprehensive scheme" is necessary to control youth access to tobacco products, they confirm that this is a subject for federally uniform legislation, rather than a patchwork of state laws regulating carriers. Br. for *Amicus Curiae* Tobacco Control Legal Consortium, et al. 4-5.

Delivery Law are "related to" a service of commercial carriers of property. Pet. App. 15-17. Despite petitioner's assertions, the test applied by the First Circuit was not "boundless." Pet. 16, 26. In addition to evaluating the challenged provisions' express references and significant effects on service, the court also examined the structure and purpose of the FAAAA. Pet. App. 13-14, 17.

a. There can be little doubt that Congress intended the *Morales* standard to apply to the FAAAA. As the court of appeals noted, "[t]he FAAAA's drafters were familiar with *Morales* and approved of its reasoning." Pet. App. 15. The Conference Committee Report expressly embraced "the broad preemption interpretation adopted by the United States Supreme Court in *Morales*." H.R. Conf. Rep. No. 103-677, at 83. Congress's intent to adopt *Morales* as the scope of FAAAA preemption must be honored. *English v. General Elec. Co.*, 496 U.S. 72, 79 (1990) (preemption is a matter of congressional intent). Accordingly, this Court's subsequent conclusions that federal preemption under ERISA is more narrow than that recognized in *Morales* for the Airline Deregulation Act do not apply here.

b. Nor does the court of appeals' straightforward application of *Morales* to the instant dispute warrant this Court's review. Petitioner seeks error correction where there is none. The court below examined, as required by *Morales*, the references and effects of the preempted state law and the structure and purpose of the FAAAA.

The court below correctly held that Section 1555-C(3)(C) expressly refers to carriers and the delivery services they provide, thereby satisfying the *Morales* Court's express reference test. Pet. App. 23; *see* pages 9-10, *supra*. With regard to effects, the record below plainly establishes that the challenged provisions of the Maine Tobacco Delivery Law significantly have affected carriers' services.[11]

[11] In no manner are these burdens inchoate. The record before the district court demonstrates that compliance with Section 1555-C(3)(C) requires the "examin[ation] of *every* package" bound for Maine; assurance that delivery of the package, should it contain tobacco

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Petitioner does not contest the significant effects on carriers' services established by the record, including that the challenged provisions caused UPS to abandon lawful deliveries of tobacco products to Maine consumers. His attempt to minimize the effects of Section 1555-C(3)(C) by suggesting that some carriers already offer complying adult-signature services (Pet. 16, 23) ignores that Section 1555-C(3)(C) not only requires adult signatures and age verification, but also requires that carriers make deliveries only to the specific addressee and, in all events, is contradicted by the record below.[12] His professed

products, is made "only to the particular addressee (not leaving the package on the porch or with whoever answers the door or with a neighbor or in the office mailroom)"; and the "demand [for a] valid government-issued photo identification showing legal age to purchase tobacco" for any addressee under the age of twenty-seven. Pet. App. 64. Relying on this record, the court of appeals concluded that Section 1555-C(3)(C) imposes substantial burdens and has significant effects on carriers' services. *Id.* at 23 (noting that "[d]elays in searching for the purchaser, making multiple delivery attempts if the purchaser cannot be located, obtaining the purchaser's signature, and verifying the purchaser's age all could affect timely deliveries").

The effects of the imputed knowledge provision of Section 1555-D are no less onerous. The court of appeals reasoned that, by imputing knowledge to a carrier for deliveries of packages shipped by a retailer on the Attorney General's list or marked as containing tobacco products, Section 1555-D "has the effect of forcing UPS to change its uniform package-processing procedures." *Id.* at 27-28. Compliance with state law thus had the effect of forcing carriers to: "specially inspect every package destined for delivery in Maine"; segregate all packages containing tobacco products; and then research those packages to determine whether the recipient is licensed (and therefore authorized to receive the package). *Ibid.*

[12] *See* Statement Of Undisputed Material Facts In Support Of Plaintiffs' "As Applied" Motion For Summary Judgment ¶ 38-44. Petitioner's *amici* likewise ignore Section 1555-C(3)(C)'s requirement of personal delivery to the addressee. *See* Br. for *Amicus Curiae* Tobacco Control Legal Consortium, et al. 8. As to Section 1555-D, petitioner asserts that UPS already checks the outside of packages for some purposes (Pet. 24), but fails to contest the significant effects on carriers' services of having to identify packages marked as containing tobacco products or shipped by retailers on the Attorney General's list, as

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inability to see how Section 1555-C(3)(C) "*regulates* the service provided by carriers" (*id.* at 23 (emphasis supplied)) is immaterial in light of the provision's undisputed effects on carriers' service. *See Morales*, 504 U.S. at 386 (rejecting argument that "only state laws specifically addressed to the airline industry are pre-empted" by the Airline Deregulation Act); *id.* at 388 (significant effects test).

2. The Challenged Provisions Are Preempted Even Though Enacted In Part To Promote Health

Petitioner contends that the challenged provisions of the Maine Tobacco Delivery Law are outside the scope of the FAAAA because they are not "*economic* laws." Pet. 20. Petitioner's attempt to limit FAAAA preemption to state laws enacted exclusively for the purpose of imposing economic regulations on carriers is contrary to the text and purpose of the FAAAA's express preemption provisions.

a. The text of the FAAAA preemption provisions is expansive and is by no means limited to state economic regulation. Rather, the FAAAA preempts "*a law, regulation, or other provision having the force and effect of law*" related to a carrier's price, route, or service. 49 U.S.C. §§ 14501(c)(1), 41713(b)(4)(A) (emphasis added).

The breadth of this provision is confirmed by the very fact that the FAAAA saves from preemption certain types of state law.[13] Each of the four matters listed in the FAAAA

established by the record. Petitioner's conjecture about UPS's ability to develop a means of complying with the Maine Tobacco Delivery Law (Pet. 11-12) is immaterial, because the issue is whether the challenged state law is "related to" carriers' service, not whether it is technologically conceivable, at some unknown cost, to alter services to comply with state law.

[13] The House Conference Report indicates that the savings clauses were not "all inclusive," but merely identified "some of the matters which are not 'prices, routes, or services' and which are therefore not preempted." H.R. Conf. Rep. No. 103-677, at 84. Nothing in the savings

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savings clauses, 49 U.S.C. §§ 14501(c)(2)(A) and 41713(b)(4)(B)(i), was, and is, the subject of a statutory grant of congressional authority to permit State regulation within defined limits. *See* 49 U.S.C. § 5125 (transportation of hazardous cargo), § 14504 (minimum amounts of financial responsibility related to insurance), §§ 31111-31113 (restrictions on size of motor vehicles), § 30103(b) (motor vehicle safety standards), §§ 31131-31147 (commercial motor vehicle safety). Thus, Congress used the "Matters Not Covered" to clarify that the authority granted by those other statutes was not repealed by the FAAAA. Petitioner's attempt to create broad new exemptions from preemption for all health- and safety-related laws is inconsistent with Congress's having drafted exemptions. If the FAAAA were confined to preempting state economic regulation, the savings clauses would have been superfluous.

Petitioner, in effect, asks this Court to rewrite the FAAAA to substitute the words "economic regulation" for the phrase "law, regulation, or other provision having the force and effect of law." But this request ignores that "the plain wording of the clause * * * necessarily contains the best evidence of Congress's pre-emptive intent." *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664 (1993); *see Sprietsma v. Mercury Marine*, 537 U.S. 51, 62-63 (2002) (same). Petitioner likewise ignores that any departure from the text is a matter to be taken up by Congress, not the courts. *See, e.g., PGA Tour, Inc. v. Martin*, 532 U.S. 661, 689 n.51 (2001) (complaint about scope or application of Americans with Disabilities Act "is a complaint more properly directed to Congress, which drafted the ADA's

clauses themselves or in that reference in the legislative history suggests, however, that Congress *sub silentio* intended to immunize wholesale an entire category of state laws from the scope of preemption, as petitioner would have it, regardless of their effects on price, route, or service. Indeed, under petitioner's view, the savings clause for motor vehicle safety would be surplusage, as there would be no need to exempt any forms of non-economic regulation from the scope of preemption.

coverage broadly"); *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 462 (2002) ("parties should not seek to amend the statute by appeal to the Judicial Branch"); *United States v. James*, 478 U.S. 597, 612 (1986) (if unambiguous statute "is to be changed, it should be by Congress and not by this Court").

b. Moreover, restricting FAAAA preemption to state "economic regulation" would reintroduce the very inefficiencies Congress intended to eliminate. H.R. Conf. Rep. No. 103-677, at 86-87 (expressing the need to eliminate the inefficiencies cause by the "patchwork of regulation" – including restrictions on the "types of commodities carried" – that had created a "huge problem for national and regional carriers attempting to conduct a standard way of doing business"). Carriers not only would have to consult state and local laws to determine whether and how they could deliver particular commodities, they also would have to determine the particular *motivation* underlying those laws to determine whether they were "economic regulation" (and therefore preempted) or enacted for some other purpose (and therefore not preempted). This task would be particularly difficult in light of the mixed motivation underlying some state regulations, such as the dual tax and health purposes underlying Maine's Tobacco Delivery Law. *See* Pet. App. 39. Subjecting carriers' services to varying state policies is inconsistent with the uniformity that Congress sought to achieve. *Cf. American Airlines, Inc. v. Wolens*, 513 U.S. 219, 229 n.5 (1995) (applying analogous preemption provision of Airline Deregulation Act) (" 'States may not seek to impose their own public policies . . . on the operations of an air carrier.' ") (citation omitted).

c. Petitioner's reliance on *City of Columbus v. Ours Garage & Wrecker Serv., Inc.*, 536 U.S. 424 (2002), is unavailing, as the preemptive reach of the FAAAA was not before the Court in that case. Rather, the Court there analyzed whether Congress intended States to delegate to localities the authority preserved by the motor vehicle safety savings clause of the FAAAA. In holding that delegation was permitted, the Court concluded that

Congress designed that savings clause "to ensure that its preemption of States' economic authority over motor carriers of property" would "'not restrict' the preexisting and traditional police power over safety," which "typically includes the choice to delegate" authority to local governments. 536 U.S. at 439-440. Indeed, in most circumstances this Court initially presumes that traditional state police powers are not preempted, even if the Court subsequently concludes that Congress intended for preemption to apply. As such, petitioner's attempt to seize upon this reference as putative support for his contention that FAAAA preemption is limited solely to state economic regulation significantly overstates the *City of Columbus* holding.

Moreover, under petitioner's view, even where, as here, Congress has broadly preempted a "law, regulation, or other provision having the force and effect of law," preemption would be limited solely to the specific manifestation of the problem that motivated Congress to act. This Court has rejected such arguments that Congress must have contemplated a particular application of a law for the law to apply, holding that "the fact that a statute can be 'applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth.'" *Pennsylvania Dep't of Corr. v. Yeskey*, 524 U.S. 206, 211-212 (1998) (citation omitted) (plain language of Americans with Disabilities Act applies to state prisoners even if unintended by Congress); *Morales*, 504 U.S. at 385 n.2 ("legislative history need not confirm the details of changes in the law effected by statutory language before we will interpret that language according to its natural meaning").[14]

[14] Petitioner fails to show that application of FAAAA preemption to regulation of carriers' deliveries of tobacco products is inconsistent with the Synar Amendment, 42 U.S.C. § 300x-26, which conditions certain federal grants to States on their having enacted laws prohibiting sales of tobacco products to minors. Pet. 22. As the court of appeals correctly concluded: "The FAAAA and Synar Amendment can exist harmoniously because the states may pass laws to curb underage smoking without

(Continued on following page)

CONCLUSION

For the reasons set forth above, the petition for a writ of *certiorari* should be denied.

Respectfully submitted,

PAUL T. FRIEDMAN
RUTH N. BORENSTEIN
LAWRENCE R. KATZIN
MORRISON & FOERSTER LLP
425 Market Street
San Francisco, CA 94105-2482
Tel.: (415) 268-7000
Fax: (415) 268-7522

BETH S. BRINKMANN
Counsel of Record
MORRISON & FOERSTER LLP
2000 Pennsylvania Avenue, NW
Washington, DC 20006-1888
Tel.: (202) 887-1544
Fax: (202) 887-0763

Counsel for Respondents

November 29, 2006

passing laws 'related to' carrier prices, routes, or services." Pet. App. 21 n.12. Petitioner also relies on Congress's silence about pre-existing Maine contraband delivery laws (Pet. 22), but there is no evidence that Maine, or any other State, ever enforced such restrictions against carriers or that Congress was aware of, much less intended to endorse, any purported enforcement of such laws.

(4)

No. 06-457

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In The
Supreme Court of the United States

G. STEVEN ROWE, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF THE STATE OF MAINE,

Petitioner,

v.

NEW HAMPSHIRE MOTOR TRANSPORT ASSOCIATION, MASSACHUSETTS MOTOR TRANSPORTATION ASSOCIATION, INC., and VERMONT TRUCK & BUS ASSOCIATION, INC.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

REPLY IN SUPPORT OF PETITION

G. STEVEN ROWE
Attorney General
PAUL STERN
Deputy Attorney General
(*Counsel of Record*)
MELISSA REYNOLDS O'DEA
PETER B. LAFOND
CHRISTOPHER C. TAUB
Assistant Attorneys General
Office of the Attorney General
6 State House Station
Augusta, ME 04333-0006
Tel: (207) 626-8568

Counsel for Petitioner

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

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REPLY IN SUPPORT OF PETITION

A. Respondents, like the First Circuit, read the Federal Aviation Administration Authorization Act of 1994 ("FAAAA"), 49 U.S.C. §§ 14501(c)(1) and 41713(b)(4)(A), in a manner that has astoundingly broad consequences. Respondents do not deny that under their reading of the statute a state cannot utilize the most obvious and effective means of effectuating a prohibition against knowing delivery of tobacco and other problematic substances to minors. Even the First Circuit understood the obvious tension, impracticality and difficulty of its decision. (Pet. App. 28-29). The lower court's holding, if followed to its logical conclusion, would undermine the full panoply of non-economic state public health delivery laws (Pet. App. 18), a conclusion fully reflected in respondents' arguments. *See* Br. in Opp. 22-24.

That position cannot be right. Congress has left to, and specifically conditioned certain federal funding on, the states' control over the sale and distribution of tobacco to children. Synar Amendment, P.L. 102-321, Title II, § 202, 106 Stat. 394, *codified at* 42 U.S.C. § 300x-26(a)(1) & (b)(1); *Lorillard Tobacco Co. v. Reilly,* 533 U.S. 525, 552 (2001) (citing Synar Amendment as establishing "congressional policy that supports" "state laws prohibiting cigarette sales to minors"). It is simply inconceivable that just two years after it enacted the Synar Amendment Congress *sub silentio* dramatically limited that law by preempting the states from controlling delivery sales of tobacco to children. Nor can there be any serious doubt that state laws regulating carriers were intended to be one of the principal means of reducing the sale of tobacco to minors. Indeed, both this Court and the federal government have expressly confirmed that obvious proposition. In *Granholm*

v. Heald, 544 U.S. 460, 490-91 (2005), this Court assumed that states retain the power to do precisely what the First Circuit held was preempted – require age verification for delivery sales. And the federal report relied upon by the Court in *Granholm* explained that states could impose requirements on delivery personnel "to verify a customer's age, such as examining a picture identification," and noted in particular UPS's procedures for adult signature and identification and for notifying shippers of unlabelled wine. *FTC, Possible Anticompetitive Barriers to E-Commerce: Wine* 29, 37 (July 2003), available at http://www.ftc.gov/os/2003/07/winereport2.pdf (last visited December 8, 2006).

No credible reading of the history of the FAAAA – which was part of an effort to free carriers of state rate and tariff regulation – supports the appeals court's holding or respondents' arguments. The Administration, the American Trucking Association, and UPS asked Congress *only* for preemption of state economic regulation.[1] No one sought or mentioned preemption of public health laws because, had the carriers or the conferees even hinted

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[1] *United States House of Representatives Subcommittee on Surface Transportation, Testimony of Frank E. Kruesi, Assistant Secretary for U.S. Department of Transportation*, July 20, 1994 (economic regulation to be preempted dealt with such matters as entry controls, tariffs and rates); *Id., Testimony of James A. Rogers, Vice President, Governmental Affairs, United Parcel Service*, July 20, 1994 (UPS testified in favor of preemption of state "economic regulation," such as rates and entry restrictions); *United States Senate Subcommittee on Surface Transportation, Testimony of Thomas V. Donahue, President and Chief Executive Officer, American Trucking Association*, July 12, 1994 (testified in favor of the preemption of "state economic regulation," advocating that it would allow "states to continue to regulate non-rate or economic entry factors" and "non-economic aspects of state regulation").

at such a result, it would have prompted fierce opposition from public health and anti-smoking advocates.

Respondents continue to argue that the areas excepted from FAAAA preemption are limited to those listed in the statute. Br. in Opp. 21-22. But the language of the statute does not require that result and the conferees could not have been more clear that the list of non-economic exceptions from FAAAA preemption was "not intended to be all inclusive, but merely to specify some of the matters which are not 'prices, rates or services' and which are therefore not preempted." H.R. Conf. Rep. No. 103-677, at 84, 86-88 (1994), *reprinted in* 1994 U.S.C.C.A.N. 1715, 1756, 1758-60.

B. The sweeping breadth of the First Circuit's and respondents' reading of the FAAAA is revealed by looking at the Maine statutes struck down in this case. The lower court found preempted a provision that does not apply to carriers at all. Respondents assert that 22 Me. Rev. Stat. Ann. § 1555-C(3)(C) requires carriers to identify the contents of each package, have the addressee sign for the package, and check the age of the recipient. Br. in Opp. 3, 20. The provision requires no such thing. Section 1555-C(3)(C) mandates only that a tobacco *retailer* utilize a carrier that provides age verification and signature options. *It places absolutely no requirements on a carrier.* If a retailer uses a carrier that does not provide such options, it is the retailer and *not* the carrier that violates that provision. Under the First Circuit's broad interpretation, the FAAAA preempts that provision even though it does not implicate carriers. Moreover, respondents do not dispute that UPS both before the enactment of the Maine law and today provides reasonably priced age verification and signature options,

nor do respondents dispute that these options do not adversely affect UPS's operations.

Respondents go on to assert that section 22 Me. Rev. Stat. Ann. § 1555-D required UPS to alter its operation by looking for tobacco markings and researching whether the addressee is a licensee. Br. in Opp. 4. Of course, imputing knowledge to the carrier that a package contains tobacco is the only plausible way of preventing carriers from delivering tobacco to children or from unlicensed retailers, and even the appeals court recognized the impracticality resulting from its striking down the provision. (App. 29). Respondents do not seriously dispute that proposition.[2] Nor do they dispute that ordinarily and prior to the enactment of this law UPS visually scanned at many stages of its operations all sides of the exterior packages for various markings, nor that the additional cost of looking for tobacco markings and labels was less than a penny a package.[3] Thus, to the extent

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[2] Respondents suggest that the decision in *Robertson v. State of Washington Liquor Control Board*, 10 P.3d 1079 (Wash. App. Ct. 2000), shows that a case can be made against a trucker, without relying on imputed knowledge. Br. in Opp. 17. There, the trucker lost his vehicle to forfeiture because he failed to prove that he did not know he was hauling cigarettes. From the decision, we do not know what evidence was presented. In any event, pursuant to respondents' view of the FAAAA, the state could not use cigarette markings on packages to rebut a trucker's assertion that that he did know he was transporting cigarettes.

[3] Respondents claim that the costs to UPS are more than the petition relates. Br. in Opp. 4 n.3, 20 n.12. Respondents, however, do not dispute that the cost of visually scanning (*i.e.*, looking at) packages for tobacco markings and labels is less than one cent per package, and that the only number in the record for packages researched resulting from such scannings is a total of 33.

that Maine's law alters UPS's operations, the effect certainly is not significant.[4]

Respondents' claim that Maine is "conscript[ing] carriers to be the enforcement mechanism . . . , rather than conduct[ing] its own enforcement efforts" (Br. in Opp. 18), ignores the facts and the law. First, according to the American Lung Association, Maine leads the nation in tobacco control, receiving perfect grades for, *inter alia*, restriction of youth access. *American Lung Association – State of Tobacco Control: 2005*, at 96-97.[5] Second, and most importantly, it is illegal for any person to "sell, furnish, give away or offer to sell, furnish or give away a tobacco product to any person under 18 years of age." 22 Me. Rev. Stat. Ann. § 1555-B(1) & (2). Generally, anyone who delivers a package with tobacco markings or labels on it would be presumed to know it contains tobacco, which is the only reasonable means to enforce this law. The First Circuit's decision means that anyone who hands a package with tobacco markings to a child violates Maine law, *other than a carrier*. The appeals court thus created immunity

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[4] Regarding UPS's "nationwide policy of prohibiting shipments of cigarettes for delivery to consumers" (Br. in Opp. 4), that policy is pursuant to an agreement with New York, reached after several courts rejected commerce clause and FAAAA challenges to New York's tobacco delivery laws. Under this agreement UPS performs many of the functions contemplated by Maine law, and apparently does so without dramatically affecting UPS's operations. However, Maine cannot enforce that agreement and policy, that agreement and policy only applies to cigarettes (and not to other tobacco products covered by Maine law), UPS can terminate the agreement if New York's laws are unenforceable, *e.g.*, are preempted by the FAAAA, and the carriers remain immune from Maine penalties under the appeals court decision.

[5] This report is available at: http://www.mainelung.org/z_homepage features/Images/sotc_2005final.pdf (last visited December 8, 2006).

for carriers because they hand over the tobacco at the front door of someone's home rather than at a store counter. Congress could not possibly have intended such an absurd result. As noted, the Synar Amendment makes clear that Congress left to the states how to control youth access to tobacco. Requiring retailers and carriers to utilize at the point of delivery similar safeguards to over-the-counter sales is the obvious and most effective means to deal with the problem of delivery sales.

Respondents are therefore far afield when they contend that Maine should be faulted for not making a record below that other existing or hypothetical regulations fail to effectively protect children from tobacco deliveries. Br. in Opp. 5, 20. Respondents' preferred approach to the problem of teen smoking – imposing licensing and reporting requirements on Internet and telephone *retailers* – are of little value if the carrier who physically delivers the package with tobacco markings need not verify the age of the recipient. Even with the enforcement of the non-preempted provisions, the carrier is an open conduit for deliveries of tobacco to children. Moreover, section 1555-C(3)(C) *is* a regulation of retailers, ensuring they do what is necessary to prevent delivery of tobacco to children. Yet respondents successfully had the lower court strike it down. Maine can now effectively control neither the retailer nor the carrier at the point of delivery.[6]

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[6] Respondents erroneously assert the record is incomplete because petitioner objected to depositions of the Attorney General and other state officials regarding enforcement activities. Respondents explained to the Magistrate that the reason for this discovery was to deal with standing and ripeness issues and impact on carriers. The matter was

(Continued on following page)

C. Petitioner does not disagree with respondents that the Ninth and Second Circuit decisions do not deal with transportation of goods. Those decisions, as well as those of the lower courts, however, present a radically different approach towards the FAAAA than that of the First Circuit, which if applied to the Maine statute would mandate a different result. The First Circuit entirely discounted the nature and public health import of the state law, instead finding that so long as it affected UPS's operations, it was preempted. No other case in the land has interpreted the FAAAA so broadly, and respondents do not suggest otherwise.

While there is no dispute regarding the body of legislative history, the First Circuit reads that history much differently than the other cases. For example, the Ninth Circuit looked to legislative history which identified a few states, including Maine and California, as having no laws that were intended to be preempted. *Californians for Safe & Competitive Dump Truck Transp. v. Mendonca*, 152 F.3d 1184, 1087 (9th Cir. 1998), *cert. denied,* 526 U.S. 1060 (1999). Because a prevailing wage law was on the books in California at the time of the FAAAA's enactment, the Ninth Circuit found there was no preemption of such laws. Under the Ninth Circuit's reasoning in *Mendonca*, tobacco delivery laws would be upheld because, *inter alia,* delivery laws were on the books in Maine at the time of enactment of the FAAAA.

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resolved by the parties stipulating that "there is an immediate threat of enforcement" of the challenged provisions against "any carrier coming into the State of Maine." *Report of Telephone Conference and Order* (July 15, 2004). At no time did respondents assert that they sought discovery regarding the efficacy of the challenged provisions or any other Maine tobacco laws.

D. Respondents attempt to delicately parse out this Court's ERISA decisions to show that application of their reasoning would reach the same result as the First Circuit. Br. in Opp. 9-12. But the significance of the ERISA cases is not the specific guides devised there to address ERISA's particular preemption provision, but rather that the courts look behind the broad "related to" language to the actual legislative intent in order to determine if Congress intended to preempt areas of traditional state regulation. *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 656 (1995). There is no doubt that Congress intended that public health laws were not to be preempted by the FAAAA because "[t]he problem to which the congressional conferees attended was 'state *economic* regulation'." *City of Columbus v. Ours Garage and Wrecking Service, Inc.*, 536 U.S. 424, 440 (2002) (emphasis in original). Under the ERISA cases, moreover, the lack of any positive indication of an intent to preempt an area of state regulation (which is the case here regarding tobacco delivery laws), and the enactment by Congress of a law that reinforces the state law (here, the Synar Amendment), strongly argues against preemption. *See California Div. of Labor Standards Enforcement v. Dillingham Construction, Inc.*, 519 U.S. 316, 332 n.7 (1997).

The legislative history of the FAAAA makes clear that when the conferees referred to *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374 (1992), as setting forth the level of preemption, they intended to apply that preemption only to "economic" regulations, H.R. Conf. Rep. No. 103-677, at 83, 84, 86-88 (1994), *reprinted in* 1994 U.S.C.C.A.N. 1715, 1755, 1756, 1258-60, which is all that UPS and the trucking industry sought. As Congress never intended to preempt tobacco delivery laws and Maine's

laws are not "economic regulations," Respondents' crabbed application of the ERISA decisions does not apply at all.[7]

CONCLUSION

In the end, it is critically important for Maine and other states to know whether the broad, boundless import of the First Circuit decision, which wholly discounts the states' public health police powers, is the law of the land, or a more refined version of preemption is applicable which might allow some effective regulation of retailers and carriers. Even respondents do not dispute that tobacco delivery sales to children are a significant national public health problem. The states need to know whether statutes such as Maine's are permissible means of addressing that problem.

Respectfully submitted,

G. STEVEN ROWE
Attorney General
PAUL STERN
Deputy Attorney General
(Counsel of Record)
MELISSA REYNOLDS O'DEA
PETER B. LAFOND
CHRISTOPHER C. TAUB
Assistant Attorneys General
Six State House Station
Augusta, ME 04333-0006
(207) 626-8568

Counsel for Petitioner

[7] Respondents also suggest that these provisions are economic because they deal with tax collection. As the district court held below, however, the challenged provisions had nothing to do with tax collection. Petitioner's Appendix, 59 n.76.

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No. 06-457

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In The Supreme Court of the United States

G. STEVEN ROWE, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF THE STATE OF MAINE,

Petitioner,

v.

NEW HAMPSHIRE MOTOR TRANSPORT ASSOCIATION, MASSACHUSETTS MOTOR TRANSPORTATION ASSOCIATION, INC., and VERMONT TRUCK & BUS ASSOCIATION, INC.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

PETITIONER'S SUPPLEMENTAL BRIEF IN RESPONSE TO THE UNITED STATES

G. STEVEN ROWE
Attorney General
PAUL STERN
Deputy Attorney General
(Counsel of Record)
MELISSA REYNOLDS O'DEA
PETER B. LAFOND
CHRISTOPHER C. TAUB
Assistant Attorneys General
OFFICE OF THE ATTORNEY GENERAL
6 State House Station
Augusta, ME 04333-0006
Tel: (207) 626-8568

Counsel for Petitioner

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342 2831

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SUPPLEMENTAL BRIEF IN RESPONSE TO THE UNITED STATES

Petitioner files this supplemental brief in response to the United States' brief recommending denial of the petition. The United States rejects much of the reasoning of the First Circuit and respondents, ultimately agreeing with the appeals court's judgment only because of several flawed premises, perhaps the most important being the supposition that the decision has little if any effect on law enforcement.

DISCUSSION

1. Maine wants to successfully prosecute anyone, including a carrier, who delivers tobacco to children. No regulatory scheme is effective unless it can be enforced in court. No one thus far in the filings with this Court disagrees that the primary way to prosecute a person for furnishing tobacco in a package to a child is to present evidence in court that the package has markings or labels on the outside that indicate the package contains tobacco products. The practical problem, ignored by the United States, is that under the First Circuit decision regarding the second part of 22 Me. Rev. Stat. Ann. § 1555-D, Maine cannot use this evidence against a carrier.[1]

The United States asserts that carriers may be "subject to generally applicable laws that prohibit furnishing tobacco to minors," and appears to approve of state laws that "ban[] outright the direct shipment of cigarettes to individual

[1] The fact that markings and labels are the best indication that a package contains tobacco products is demonstrated by the tobacco settlement agreement between UPS and New York, under which UPS inspects the outside of packages for tobacco labels and markings.

consumers." United States Br. at 11, 18. Maine has a general prohibition against any person furnishing tobacco to children. 22 Me. Rev. Stat. Ann. § 1555-B(2) ("A person may not sell, furnish, give away . . . a tobacco product to any person under 18 years of age"). The practical question is how does a state enforce even such a "general" law when prosecuting a carrier in court? This is a question that the United States sidesteps. The only identified means, of course, is to put into evidence a label or marking from the outside of the package – to impute knowledge, which is all that the second part of section 1555-D calls for. But the First Circuit held that Maine can do nothing – directly or indirectly – that has the effect of forcing a carrier to change its uniform procedures, and that imputing knowledge has that effect. (Pet. App. 28). If Maine or another state attempted to introduce such evidence, carriers would certainly argue that use of such evidence to enforce a "general" law against a carrier would require the carrier to take account of these markings and labels, thus affecting its uniform procedures, which is proscribed by the First Circuit decision. The brief of the amici states highlights the practical importance of this issue. *Brief Amicus Curiae of the State of California and 35 Other States in Support of the Petition* at 7-8. Even the appeals court alluded to these practical difficulties. (Pet. App. 28-29).

Respondents do not concede that Maine or another state could use such evidence to enforce "general" laws or bans. Carriers elsewhere challenged just such a ban against tobacco deliveries to consumers. *New York State Motor Truck Assoc. v. Pataki,* 2004 U.S. Dist. Lexis 25519 (S.D. N.Y. 2004). If the United States proposes that the Federal Aviation Administration Authorization Act of 1994 (FAAAA) permits the use of evidence of markings and

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labels in a prosecution pursuant to a "general" law or ban, but not pursuant to a law that specifically identifies that evidence, the United States should have said so. But that proposition on its face makes no sense because the effect on the carriers is the same – they must look for and consider tobacco markings and labels.[2]

There are two other pertinent points to make regarding the United States' support of bans on delivery of tobacco. United States Br. at 17-18. First, in order to comply with such a ban, the carrier must do exactly the same things it must do to comply with the second part of section 1555-D – take account of tobacco markings and labels, which the United States ignores. Second, it would be a strange Congressional purpose that allows states to totally *ban* the delivery of tobacco products but prevents states from *regulating* tobacco products in a manner which allows them to be delivered under certain circumstances.

2. As to 22 Me. Rev. Stat. Ann. § 1555-C(3)(C), the United States correctly rejected the "reference to" theory

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[2] In its discussion on this point, the United States highlights yet another problem with the First Circuit decision. The United States relies upon the appeals court's conclusion that the first part of section 1555-D – the prohibition against knowing delivery of tobacco – is not preempted because it does not "require that carriers modify their delivery methods other than by declining to transport a product that Maine has legitimately banned." United States Br. at 13. Elsewhere, however, the lower court rejected that very argument when made by petitioner regarding section 1555-C(3)(C). (Pet. App. at 24) ("The Attorney General's alternative argument – that there is no preemption because a carrier can forgo certain tobacco-product deliveries in Maine – also fails.") In addition, the lower court did not apply that reasoning to the second part of section 1555-D which imputes knowledge of markings and labels to a carrier. The lower court's internal inconsistency on this point is yet another reason to grant the petition.

asserted by respondents and adopted by the First Circuit (Pet. App. 23). United States Br. at 8-9. Instead, the United States went on to support the First Circuit's decision with an argument that a court "might well conclude" that section 1555-C(3)(C) is not preempted if the service required by that provision was "generally offered," but the United States concluded "*no* carrier offers [it] in the marketplace." United States Br. at 11-12, & 19 ("To the extent such an adult-only-signature service is commercially available, a state law requiring shippers to utilize such a service would not . . . be a law 'related to' motor carriers"). The United States acknowledges that if "carriers had made an independent commercial decision to offer a service [it] would be strong evidence that, as Congress intended, the carriers' '[s]ervice options [were] dictated by the marketplace; and not by an artificial regulatory structure.'" *Id.* at 11.

The lower courts, however, took the opposite approach, and rested their decisions entirely upon UPS's experience because, as argued by respondents, so long as a *single* carrier did not provide the prescribed service and therefore was affected by the Maine law, that law was preempted. (Pet. App. 9-10, 68, 79-80). Petitioner unsuccessfully argued that the courts should consider other carriers but the lower courts' "single carrier" decisions foreclosed evidence on that theory.[3] The United States' reading of the FAAAA, therefore, is directly contrary to that of the First Circuit, allows consideration of the experiences of more than a single carrier to determine the availability of the service in the marketplace, and would

[3] Below, respondents successfully avoided petitioner's discovery requests regarding their other carrier members' services.

require the First Circuit to remand the issue to be developed and resolved.[4] In sum, the United States asks this Court to deny the petition on the basis of a legal theory not relied upon by the lower court.

Importantly, UPS provides a service that would allow it to comply with Maine law without doing anything new. The United States draws a distinction between a "recipient" and an "addressee," (United States Br. at 11-12), a difference not made on UPS's website.[5] In any case, under UPS's preexisting standard operating procedures, if any delivery (be it general, "signature required," or "adult signature required") cannot be made for whatever reason, the UPS deliveryman returns the package to the local UPS facility for pickup by the recipient.[6] In deliveries requiring

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[4] Because respondents have the burden of proof, it is incumbent upon them to demonstrate that this service was not available, but they made no effort to do so because of their theory of the case.

[5] According to UPS's website, the recipient is the person or entity that the shipper puts on the label. UPS, *How to Prepare for Shipping*, <http://www.ups.com/content/us/en/resources/prepare/guidelines/prepare_package4.html> (visited May 29, 2007). The UPS provides the following services for a small additional fee:

> **Signature Required:** UPS will obtain the recipient's signature and provide you with a printed copy. You may also view the recipient's signature online.
>
> **Adult Signature Required:** UPS will obtain the adult recipient's signature and provide you with a printed copy. Adult recipients must be at least 21. You may also view the adult recipient's signature online.

UPS, *Delivery Confirmation*, <http://www.ups.com/content/us/en/shipping/time/service/value_added/delivery.html> (visited May 29, 2007).

[6] UPS returns the package to the local UPS facility after three delivery attempts, to be held for pickup by the recipient within five days. There is no extra charge for this procedure, which appears to be built into the cost of standard, recipient-signature, and adult-recipient-signature services. UPS, *Learn About the UPS InfoNotice*,

(Continued on following page)

an adult signature, contrary to the United States' suggestion, UPS does not simply leave the package with "whoever answers the door" such as a ten-year old. United States Br. at 12.

The United States asserts that a state law is preempted only if it has a "significant" or "dramatic" effect on carrier services. United States Br. at 9, 10. The question then is whether the application of this preexisting procedure to a purportedly new "addressee" service has such a "dramatic effect." It is hard to see how applying UPS's present "failure of delivery" procedures to an "adult-*addressee*-signature" delivery as compared to the present "adult-*recipient*-signature" delivery, to the extent the two are different, would have a significant effect. Respondents presented no evidence or study explaining how its preexisting procedures regarding failures of delivery for its "adult-*recipient*-signature" service when applied to an "adult-*addressee*-signature" service would have "significant" and "dramatic" impacts. (Pet. App. at 28 n.14, 65 n.92). Indeed, petitioner specifically sought in discovery studies on the effect of Maine's law on UPS's operations, and were told there were none.

The lower court, moreover, did not apply a "dramatic" effects test, but rather utilized a strict "affecting timeliness and effectiveness" standard. (Pet. App. at 23). At the very least, this reveals that the appeals court, the United States and the respondents do not agree on the appropriate standard for preemption under the FAAAA, calling for consideration of the issue by the Court.

<http://www.ups.com/content/us/en/tracking/help/tracking/inonotice.html> (visited on May 29, 2007).

3. The United States does not dispute that Maine's laws are enacted not as economic regulation but as efforts to protect the public health. Nor does the United States disagree with the bedrock principle that such a law is not preempted unless Congress unambiguously intended to do so. Nowhere does the United States identify any intent by Congress to preempt tobacco delivery laws. The United States argues, as previously noted, that for FAAAA preemption to be found, a carrier must prove "significant" and "dramatic" effect. United States Br. at 9, 10. Thus, the United States does not agree with respondent that any law referring to or affecting a carrier is preempted. The United States, however, ignores the only evidence in the record that the "effect" of the second part of section 1555-D on UPS's existing inspection procedures is less than one cent per package. Thus, the United States' application of the standard it proposes to the undisputed facts mandates a conclusion opposite to the one it reached. The United States cannot seriously argue that when Congress passed the Synar Amendment[7] and the FAAAA, Congress intended the absurd result that states could not regulate deliverers of tobacco because of such a small cost.

According to the United States, because the Synar Amendment did not specifically mention third party carriers and such carriers are not the classic tobacco "distributor," the FAAAA trumps both the Synar Amendment and preexisting state police powers. United States Br. at 16-17. The Synar Amendment uses the broadest of language, requiring a state to have "in effect a law providing that it is unlawful for any manufacturer, retailer, or distributor of tobacco products to sell or distribute any such

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[7] ADAMHA Reorganization Act, Pub. L. No. 102-321, Title II, § 202, 106 Stat. 394 (42 U.S.C. § 300x-26).

product to any individual under the age of 18." 42 U.S.C. § 300x-26. There is no dispute that the carriers are part of the tobacco distribution system and profit from it. And, at the very least, under the United States' reasoning, because the Synar Amendment applies to *retailers*, Congress approved of and encouraged state laws such as section 1555-C(3)(C) that regulate how *retailers* "distribute" tobacco, and there is nothing in the language or legislative history of the FAAAA that suggests otherwise.

4. The FAAAA's exceptions, 49 U.S.C. §§ 14501(c)(1), 41713(b)(4)(B), were clearly intended by Congress to be illustrative of state non-economic regulations that were not "related to a price, route or service." H.R. Conf. Rep. No. 103-677, at 84, 86-88 (1994), *reprinted in* 1994 U.S.C.C.A.N. 1715, 1756, 1758-60 (specific exceptions "were not intended to be all inclusive, but merely to specify some of the matters which are not 'prices, rates or services' and which are therefore not preempted.") Like the First Circuit, the United States wholly discounts that intent. United States Br. at 14-15. What the United States is saying is that because the "not . . . all inclusive" list of exceptions is not all inclusive, Congress intended that the list be "all inclusive." The United States' perspective simply defies the legislative history and common sense.

5. Regarding the conflict with other circuits, under a fair reading, it is doubtful that the court in *Californians for Safe & Competitive Dump Truck Transp. v. Mendonca*, 152 F.3d 1184, 1087 (9th Cir. 1998), *cert. denied*, 526 U.S. 1060 (1999), would conclude that a state law that requires carriers to look for tobacco markings (while they are also looking for other markings) at an additional cost of less than a penny per package, would "*acutely* interfere" with carriers' fundamental operations. United States Br. at

19-20. That court found a law that increased prices by as much as 25 percent was not preempted by the FAAAA. *Mendonca*, 152 F.3d at 1189. Under the Ninth Circuit's reasoning, tobacco delivery laws like those of Maine would be considered non-economic public health laws, so as to be outside the preemptive ambit of the FAAAA.

CONCLUSION

The United States' recommendation does not provide a solution to the practical problems of tobacco enforcement raised by the First Circuit's decision, relies upon interpretations of the FAAAA that were either rejected or not considered at all by the First Circuit, and refutes the appeals court's "reference to" approach. The United States' brief, therefore, raises more questions than it answers, buttressing rather than undermining this petition which seeks to clarify the preemptive effect of the FAAAA on state tobacco laws.

Respectfully submitted,

G. STEVEN ROWE
Attorney General
PAUL STERN
Deputy Attorney General
(Counsel of Record)
MELISSA REYNOLDS O'DEA
PETER B. LAFOND
CHRISTOPHER C. TAUB
Assistant Attorneys General
Six State House Station
Augusta, ME 04333-0006
(207) 626-8568

Counsel for Petitioner

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

PAUL D. CLEMENT
Solicitor General
Counsel of Record
PETER D. KEISLER
Assistant Attorney General
EDWIN S. KNEEDLER
Deputy Solicitor General
DOUGLAS HALLWARD-DRIEMEIER
Assistant to the Solicitor General
MARK B. STERN
CHRISTINE N. KOHL
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTIONS PRESENTED

The Federal Aviation Administration Authorization Act of 1994 (FAAA Act) provides, with certain exceptions inapplicable here, that "a State * * * may not enact or enforce a law * * * related to a price, route, or service of any motor carrier * * * with respect to the transportation of property." 49 U.S.C. 14501(c)(1). See also 49 U.S.C. 41713(b)(4)(A). The questions presented in this case are:

1. Whether the FAAA Act preempts a state law that requires a seller of tobacco products to use only delivery services that will take certain statutorily specified actions to ensure that the purchaser is not a minor.

2. Whether the FAAA Act preempts a state law that effectively requires a delivery service to change its package-processing procedures in order to avoid being deemed to have knowledge that a package contains tobacco products.

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

INTEREST OF THE UNITED STATES

This brief is submitted in response to the order of this Court inviting the Solicitor General to express the views of the United States. In the United States' view, the preemption holding of the court of appeals is correct and does not merit this Court's review.

STATEMENT

1. The Airline Deregulation Act of 1978 (ADA), Pub. L. No. 95-504, 92 Stat. 1705, largely deregulated the domestic airline industry. "To ensure that the States would not undo federal deregulation with regulation of their own," *Morales* v. *TWA*, 504 U.S. 374, 378 (1992), the ADA preempted state laws "relating to rates, routes, or services of any air carrier." ADA § 4(a), 92 Stat. 1708. As interpreted in *Morales*, that provision preempts state laws that "have a connection with, or reference to, airline 'rates, routes, or services.'" 504 U.S. at 384.

Two decades later, finding that state regulation of the transportation of property had "imposed an unreasonable burden on interstate commerce," "impeded the free flow of trade," and "placed an unreasonable cost" on American consumers, Congress passed the Federal Aviation Administration Authorization Act of 1994 (FAAA Act), Pub. L. No. 103-305, § 601(a)(1), 108 Stat. 1605. The FAAA Act further deregulated the transportation of property by both air and motor carriers by adding two sections modeled on the ADA's preemption provision. One of those provisions sets forth the following "General rule":

> Except as provided in subparagraph (B), a State * * * may not enact or enforce a law * * * related to a price, route, or service of an air carrier or carrier affiliated with a direct air carrier * * * when such carrier is transporting property by aircraft or by motor vehicle.

49 U.S.C. 41713(b)(4)(A). The other provision similarly states:

> Except as provided in paragraphs (2) and (3), a State * * * may not enact or enforce a law * * * related to a price, route, or service of any motor carrier (other than a carrier affiliated with a direct air carrier covered by section 41713(b)(4)) * * * with respect to the transportation of property.

49 U.S.C. 14501(c)(1).[1] This legislation was intended to extend to motor carriers the same rule of preemption of state laws related to prices, routes, and services that is embodied in the ADA as broadly interpreted in *Morales*. H.R. Conf. Rep. No. 677, 103d Cong., 2d Sess. 82, 83 (1994) (H. Rep. 677).

As indicated above, the FAAA Act preempts state law "[e]xcept as provided" in specified provisions that identify "[m]atters not covered." 49 U.S.C. 14501(c)(1) and (2)(A), 41713(b)(4)(A) and (B)(I). The matters "[e]xcept[ed]" from preemption are a State's "safety regulatory authority" with respect to motor vehicles; authority "to impose highway route controls or limitations based on the size or weight of the motor vehicle or the hazardous nature of the cargo"; and authority to regulate certain motor carrier insurance requirements. *Ibid.* The transportation of household goods is also excluded. 49 U.S.C. 14501(c)(2)(B), 41713(b)(4)(B)(ii).

2. a. The State of Maine has, for some time, prohibited any person from selling, furnishing, or giving away tobacco products to any person under 18 years of age. See 22 Me. Rev. Stat. Ann. § 1555-B(2) (West Supp. 2006) (22 Me. Stat.); *id.* § 1555 (Supp. 1996). Prior to 2003, the State permitted the retail sale of tobacco products "only in a direct, face-to-face exchange in which the purchaser may be clearly identified and through the mail under procedures approved by the [State] to provide reliable verification that the purchaser is not a minor." *Id.* § 1555-B(1)

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[1] Section 14501(c)(1) was originally codified at 49 U.S.C. 11501(h)(1) (1994). See FAAA Act § 601(c), 108 Stat. 1606. It was amended and recodified in 1995. See ICC Termination Act of 1995, Pub. L. No. 104-88, § 103, 109 Stat. 899.

(Supp. 1997). In 2003, Maine enacted a law to regulate "delivery sales of tobacco products within the State." An Act to Regulate the Delivery and Sales of Tobacco Products and to Prevent the Sale of Tobacco Products to Minors, 2003 Me. Laws ch. 444 (Tobacco Delivery Law); 22 Me. Stat. § 1555-C (2004). That law permits a tobacco retailer licensed by the State to sell tobacco products directly to consumers in response to phone, internet, or mail orders, provided that the retailer takes certain measures to ensure that such sales are not to minors. See *id.* § 1555-C(1), (2) and (3).

As pertinent here, the State requires a retailer that engages in delivery sales to "utilize a delivery service," 22 Me. Stat. § 1555-C(3)(C), which the statute defines as "a person, including the United States Postal Service, who is engaged in the commercial delivery of letters, packages or other containers," *id.* § 1551(1-C). Before shipping, the licensed tobacco retailer must provide the delivery service with the age of the purchaser, and it must clearly mark the outside of the package with the retailer's name and state retailer's license number, as well as indicate that the contents are tobacco products. *Id.* § 1555-C(3)(A) and (B). The statute further provides:

> The tobacco retailer shall utilize a delivery service that imposes the following requirements:
>
> (1) The purchaser must be the addressee;
>
> (2) The addressee must be of legal age to purchase tobacco products and must sign for the package; and
>
> (3) If the addressee is under 27 years of age, the addressee must show valid government-issued identification that contains a photograph of the addressee and indicates that the addressee is of legal age to purchase tobacco products.

Id. § 1555-C(3)(C).

b. In addition, "[a] person may not knowingly transport or cause to be delivered to a person in [Maine] a tobacco product purchased from a person who is not licensed as a tobacco retailer in [Maine]," unless the delivery is to a licensed tobacco distributor or retailer. 22 Me. Stat. § 1555-D. The second sentence of Section 1555-D provides that "[a] person is deemed to know that a package contains a tobacco product if the package is marked in accordance with the requirements of [Section 1555-C(3)(B)] or if the person receives the package from a person listed as an unlicensed tobacco retailer by the Attorney General." *Ibid.*

3. Respondents are non-profit trade associations whose members provide transportation service. Respondents brought suit in 2003 against petitioner in his official capacity as Attorney General of Maine, seeking to enjoin enforcement of certain provisions of the State's Tobacco Delivery Law. The district court held both Sections 1555-C(3)(C) and 1555-D invalid under the preemption provisions of the FAAA Act. Pet. App. 54-66.

4. Petitioner appealed to the Court of Appeals for the First Circuit. The court of appeals rejected petitioner's contention that the FAAA Act preempts only a State's laws that impose traditional economic regulation on carriers, such as entry controls and tariff filing requirements, not laws that protect public health and welfare pursuant to the State's traditional police power. The court reasoned that "[a]n exclusion from preemption for police-power enactments would surely 'swallow the rule of preemption,' as most state laws are enacted pursuant to this authority." Pet. App. 18. While the court found some support in the legislative history for petitioner's argument that the FAAA Act preempts only state economic regulation, it concluded that—given the broad statutory text, the Act's structure, other legislative history, and the focus of this Court's decisions in *Morales* and *American Airlines, Inc.* v. *Wolens*, 513 U.S. 219 (1995), on the effect that a state law has on carrier operations—the Act was not so limited. Pet. App. 14-21.

The court of appeals next held that Section 1555-C(3)(C) is preempted under the FAAA Act because it "expressly references a carrier's service of providing the timely delivery of packages." Pet. App. 23. That section "prescribes the method by which a carrier operating in Maine must deliver packages containing tobacco products in a way that would affect the ability of the carrier to meet package-delivery deadlines." *Ibid.* In response to petitioner's contention that Section 1555-C(3)(C) regulates tobacco retailers rather than carriers, the court ruled that such an argument "reads the broad phrase 'related to' out of the statute and replaces it with the narrower term 'regulates.'" *Ibid.* Moreover, the court of appeals explained, petitioner's argument "would lead to the untenable result of permitting states to regulate carrier services indirectly by regulating shippers." *Id.* at 24.

The court of appeals held that the first sentence of Section 1555-D, which generally bars any person from knowingly delivering contraband tobacco products, is not preempted by the FAAA Act. Because that part of Section 1555-D does not require carriers to "modify their delivery methods other than by declining to transport a product that Maine has legitimately banned," the court found that its effect on carrier services is "'too tenuous' to warrant preemption." Pet. App. 26. But the court held that the second sentence of Section 1555-D, which imputes knowledge of a package's tobacco contents to a carrier in certain circumstances (such as when the shipper is on the Attorney General's list of unlicensed retailers) "has the effect of forcing [carriers] to change [their] uniform package-processing procedures" and "prescrib[es] how carriers must operate." *Id.* at 28. The court of appeals thus held that part of Section 1555-D preempted under the FAAA Act. *Ibid.*

DISCUSSION

The court of appeals correctly ruled that the FAAA Act preempts Section 1555-C(3)(C) and the imputed knowledge portion

of Section 1555-D in Maine's Tobacco Delivery Law. The court's holding leaves open other means by which the State can effectuate its important policy—which the Federal Government shares —of preventing tobacco sales to minors. Indeed, the court of appeals left standing generally applicable provisions of Maine law that, by their own force, prevent carriers from delivering tobacco to minors. The court of appeals' ruling does not conflict with any decision of this Court or any other court of appeals. Review by this Court is therefore not warranted.

A. 1. The FAAA Act expressly preempts, with certain exceptions, any state law that is "related to a price, route, or service" of a motor carrier (including one affiliated with an air carrier) engaged in the transportation of property. 49 U.S.C. 14501(c)(1), 41713(b)(4)(A). Congress modeled the FAAA Act's preemption provisions on the similarly worded provision in the ADA that preempts state laws "relating to rates, routes, or services of any air carrier." ADA § 4(a), 92 Stat. 1708.[2] In *Morales*, this Court explained that "the key phrase * * * 'relating to' * * * express[es] a broad pre-emptive purpose." 504 U.S. at 383. The Court noted that in construing the identical words "relating to" in the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1144(a), it had held that "a state law 'relates to' an employee benefit plan, and is pre-empted by ERISA, 'if it has a connection with or reference to such a plan.'" 504 U.S. at 384 (quoting *Shaw* v. *Delta Air Lines, Inc.*, 463 U.S. 85, 97 (1983)). The Court adopted the same standard for the ADA: "State enforcement actions having a connection with or reference to airline 'rates, routes, or services' are pre-empted." *Ibid.*

Morales rejected the argument that only state laws that actually prescribe rates, routes, or services are preempted. As the Court explained, such an interpretation would effectively rewrite

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[2] As amended, the ADA provides that "a State * * * may not enact or enforce a law * * * related to a price, route, or service of an air carrier." 49 U.S.C. 41713(b)(1).

the statute by substituting the word "*regulate*" for the phrase "relating to." 504 U.S. at 385. The Court also found unconvincing the argument that "only state laws specifically addressed to the airline industry are pre-empted." *Id.* at 386. Such an interpretation "ignores the sweep of the 'relating to' language" and would "creat[e] an utterly irrational loophole." *Ibid.* The Court noted in this regard that under ERISA, a state law "may 'relate to' a benefit plan, and thereby be pre-empted, even if the law is not specifically designed to affect such plans, or the effect is only indirect." *Ibid.* (quoting *Ingersoll-Rand Co.* v. *McClendon*, 498 U.S. 133, 139 (1990)); see also *ibid.* (citing *Metropolitan Life Ins. Co.* v. *Massachusetts*, 471 U.S. 724, 739 (1985) (state law mandating benefits in group policies sold by insurance companies "relates to" an ERISA plan that purchases such policies)).

Applying the foregoing principles, the Court in *Morales* found that guidelines issued by state attorneys general regarding airline fare advertising, which purported to enforce generally applicable state consumer protection laws, 504 U.S. at 379, were preempted because the guidelines contained an "express reference" to airline fares and also because it was clear as an economic matter that the guidelines had a "forbidden significant effect" upon fares, *id.* at 388. The Court stressed, however, that, in so holding, it was not "set[ting] out on a road that leads to pre-emption of state laws against gambling and prostitution as applied to airlines." *Id.* at 390. Nor, the Court continued, did it need to address whether regulation of the nonprice aspects of fare advertising (for example, state laws preventing obscene depictions) would similarly "relate to" rates, because "the connection would obviously be far more tenuous." *Ibid.* Adapting to *Morales* a limiting principle of ERISA preemption, the Court explained that "[s]ome state actions may affect [airline fares] in too tenuous, remote, or peripheral a manner' to have pre-emptive effect." *Ibid.* (quoting *Shaw*, 463 U.S. at 100 n.21).

2. The FAAA Act was enacted two years after the decision in *Morales*. The Conference Report on the FAAA Act expresses the intent that the Court's "broad preemption interpretation" in *Morales* apply as well to the FAAA Act's comparably worded preemption provisions. H. Rep. 677, at 83. Subsequently, the Court held in *Wolens* that the ADA did not preempt state law breach-of-contract actions against an airline by participants in the airline's frequent flyer program. 513 U.S. at 228-233. The Court concluded that, although the ADA preempts States' imposition of obligations on airlines, as in *Morales*, it does not bar suits based on the airline's "own, self-imposed undertakings." *Id.* at 228. Such suits, the Court reasoned, simply hold an airline to its agreements—in *Wolens* itself, "to business judgments an airline made public about its rates and services." *Id.* at 229.

B. The question whether the provisions of Maine law at issue here are preempted by the FAAA Act must be considered in light of *Morales* and *Wolens*, as well as the Court's decisions construing the "relating to" language in ERISA's preemption clause, on which the Court extensively relied in *Morales*. Applying those principles, the court of appeals correctly held that the relevant provisions of Maine law are preempted.

1. The court of appeals concluded that Section 1555-C(3)(C), but not Section 1555-D, was preempted under the "reference to" prong of *Morales*. Pet. App. 23, 28. Although Section 1555-C(3)(C) does refer to use of a "delivery service," that fact alone does not require the provision to be set aside under the "reference to" test. Because the "reference to" test results in preemption without regard to the impact of the state law on the subject of federal regulation, this Court has given it a relatively narrow construction. The Court explained in *California Division of Labor Standards Enforcement* v. *Dillingham Construction, N.A.*, 519 U.S. 316 (1997), with respect to ERISA's preemption provision, that a state law is invalid under the "reference to" test if it "acts immediately and exclusively upon ERISA plans," or

"where the existence of ERISA plans is essential to the law's operation." *Id.* at 325. *Dillingham* gave as an example of a statute that acts "exclusively upon ERISA plans" the statute in *Mackey* v. *Lanier Collection Agency & Service, Inc.*, 486 U.S. 825 (1988), which barred the garnishment of "[f]unds or benefits of [an] * * * employee benefit plan or program subject to * * * [ERISA]." *Id.* at 828 (quoting Ga. Code Ann. § 18-4-22.1 (1982) (repealed 1990)).

Section 1555-C(3)(C) is not invalid under *Dillingham*'s "reference to" standard. By its terms, Maine's statute applies to delivery services that are not covered by the FAAA Act. Maine defines "delivery service" to include "a person, including the United States Postal Service, who is engaged in the commercial delivery of letters, packages or other containers" 22 Me. Stat. § 1551(1-C). That definition encompasses carrier or delivery services (including USPS) that are not covered by the definition of "motor carrier" in the FAAA Act. For purposes of the FAAA Act, "motor carrier" is defined as "a person providing commercial motor vehicle * * * transportation for compensation," and "commercial motor vehicle" is in turn defined as a "self-propelled or towed vehicle used on the highways in interstate commerce" that meets particular minimum requirements, such as having a gross weight or rating of 10,001 pounds or being used to transport more than eight passengers for compensation. Pub. L. No. 109-59, Tit. IV, §§ 4142(a), 4202(b), 119 Stat. 1747, 1751 (to be codified at 49 U.S.C. 13102(14) (Supp. V 2005)); 49 U.S.C. 31132(1)(A) and (B). Maine's law, on the other hand, would apply to small delivery vans and even commercial bicycle delivery services.

2. Although Maine's statutes are not preempted based on an impermissible "reference to" motor carriers, the court of appeals correctly concluded that Section 1555-C(3)(C) and the second sentence of Section 1555-D have a "forbidden significant effect," *Morales*, 504 U.S. at 388, on carrier services.

a. Although the direct objects of regulation in Section 1555-C(3)(C) are retailers, the FAAA Act is not limited to statutes that "actually prescrib[e] rates, routes, or services." *Morales*, 504 U.S. at 385. Rather, as the court of appeals recognized, it may also preempt laws that "limit retailers to hiring only those carriers that comply with the state-imposed mandates." Pet. App. 24. The requirements of Section 1555-C(3)(C)—in particular that the carrier obtain the signature of the purchaser, who also must be the addressee—would have a dramatic effect on the operations of motor carriers. As the court of appeals observed, "[d]elays in searching for the purchaser, making multiple delivery attempts if the purchaser cannot be located, obtaining the purchaser's signature, and verifying the purchaser's age," as a consequence of the requirements imposed by Section 1555-C(3)(C), "all could affect timely deliveries." Pet. App. 23.

Congress's explicit purpose in enacting the FAAA Act's preemption provisions was to alleviate the burdens that state regulation had imposed on interstate commerce and the free flow of traffic. FAAA Act § 601(a), 108 Stat. 1605. The Act thus sought to eliminate the inefficiencies in carrier operations attributable to the then-existing patchwork of state regulation. See H. Rep. 677, at 87 ("The sheer diversity of these regulatory schemes is a huge problem for national and regional carriers attempting to conduct a standard way of doing business."). The challenged provisions in Section 1555-C(3)(C) effectively require carriers to alter their uniform distribution and delivery operations in Maine in order for them to transport tobacco products in the State. If many States did the same, the resulting multiplicity of state laws would create the very patchwork of regulation that Congress sought to prevent when it deregulated the transportation industry.

Contrary to petitioner's contentions, the fact that some carriers offer services that resemble those specified by Maine in certain respects does not save the statute from preemption. Peti-

tioner notes (Pet. 23) that United Parcel Service (UPS), the carrier whose practices formed the basis of the record below, already "offers a type of delivery confirmation, adult-signature-required service." In petitioner's view, Maine's statute "merely requires that a *retailer* use a service that is provided by carriers," and therefore does not relate to carriers. *Ibid.* Where a particular service is generally offered by carriers, a court might well conclude that a state law that requires retailers to utilize that commercially available service in a particular class of sales —and that does so not as a "guise" to regulate motor carrier services as such (see H. Rep. 677, at 84), but in order to further health, safety, or similar purposes independent of the transportation industry—does not have a "forbidden significant effect" on carrier services, and therefore is not preempted. *Morales*, 504 U.S. at 388. The fact that carriers had made an independent commercial decision to offer a service would be strong evidence that, as Congress intended, the carriers' "[s]ervice options [were] dictated by the marketplace; and not by an artificial regulatory structure." H. Rep. 677, at 88. While such a state law might have some effect on the relative volumes of different carrier services, it would require no modification in carrier services or package-delivery procedures. And, while the increase in market demand for such a service might "alter[] the incentives" of carriers that had not competed for that segment of the market before, it would "not dictate the choices" of those carriers. *Dillingham*, 519 U.S. at 334.

Carriers may also be subject to generally applicable laws that prohibit furnishing tobacco products to minors. Indeed, Maine has such a provision, 22 Me. Stat. § 1555-B(2) (Supp. 2006), which respondents did not challenge. Maine also has a generally applicable statute that provides a safe harbor to one who furnishes tobacco to a person under 18 in reliance on a fraudulent identification. *Id.* § 1555-B(10). The FAAA Act does not preclude a State from regulating such primary conduct any more than it

precludes "state laws against gambling and prostitution as applied to airlines." *Morales*, 504 U.S. at 390. It may be that Maine could also apply to motor carriers a generally applicable requirement that any person to whom tobacco products are being furnished as part of a commercial transaction must show government-issued identification containing a photograph and indicating that the person is of legal age to purchase tobacco products.

Here, however, the service that Maine has prescribed by statute is one that, as far as the record reflects, *no* carrier offers in the marketplace. Maine does not merely require that an adult sign for the package (a service that petitioner contends is generally available (Pet. 23)). It very specifically mandates that "the *addressee* * * * must sign for the package" and that the carrier must check the photo identification "of the *addressee*." 22 Me. Stat. § 1555-C(3)(C)(2) and (3) (2004) (emphases added). As the district court held (Pet. App. 64-65), and the court of appeals affirmed (*id.* at 22-23), such a requirement is very different from the service UPS offers, which permits a delivery person to leave a package with "whoever answers the door or with a neighbor or in the office mailroom." *Id.* at 64. See Br. in Opp. 3, 19-20.

b. The first sentence of Section 1555-D provides that a "person" may not knowingly transport or cause to be delivered to a person in the State a tobacco product purchased from a person who is not licensed as a tobacco retailer in the State, unless the delivery is to a licensed tobacco distributor or retailer. The court of appeals held that that prohibition is not preempted by the FAAA Act. It reasoned that tobacco products purchased by a consumer from an unlicensed retailer are contraband, Pet. App. 25 (citing 22 Me. Stat. § 1555-C(7)), and that, like the laws prohibiting prostitution and gambling referred to in *Morales*, laws barring transportation or delivery of contraband (including, *e.g.*, illegal drugs) regulate primary conduct and have only a "tenuous, remote, or peripheral" relation to carrier services. Pet. App. 25-

26 (quoting *Morales*, 504 U.S. at 390). As the court of appeals noted, the first sentence of Section 1555-D requires that carriers and other persons in the State not act as knowing accomplices in the illegal sale of tobacco products. "It does not, however, require that carriers modify their delivery methods other than by declining to transport a product that Maine has legitimately banned." *Id.* at 26. Respondents do not challenge that holding.

The second sentence of Section 1555-D goes further, however, and the court of appeals correctly held it preempted. That provision imputes to a person knowledge that a package contains tobacco products "if the package is marked in accordance with the requirements of [Section 1555-C(3)(B)]" or if the seller is "listed as an unlicensed tobacco retailer" on the Attorney General's list. 22 Me. Stat. § 1555-D. That list is provided only to "delivery service[s]," which are required to "maintain [its] confidentiality." *Id.* § 1555-D(1).

In order to avoid imputed knowledge, carriers are, in effect, forced to change package-processing procedures that are otherwise uniform across the nation. For "*every* package destined for delivery in Maine," the carrier "must specially inspect" the package to determine whether it "is marked as containing tobacco or if the seller's name appears on the Attorney General's list." Pet. App. 27 (emphasis added). If the package is so marked, or the shipper is on the list, the carrier "must segregate the packages * * * and research whether the addressee is a Maine-licensed retailer or distributor who can receive the package." *Id.* at 27-28. The State is, in other words, trying to "dictate * * * a carrier's delivery procedures." *Id.* at 28.

C. Petitioner's arguments that the court of appeals erred in various respects are unpersuasive.

1. Petitioner contends (Pet. 17) that the FAAA Act "does not preempt a state's exercise of its traditional police powers in noneconomic areas." While preemption under the FAAA Act is subject to the limitations identified in *Morales* and *Wolens* and

discussed above (see pp. 11-12, *supra*), petitioner's argument for a *categorical* police-powers exception is inconsistent with the language employed in the FAAA Act and the legislative history's endorsement of the Court's "broad preemption interpretation" of similar language in *Morales*. See H. Rep. 677, at 83. Notably, the state laws held to be preempted in *Morales*, 504 U.S. at 379-380, as well as in *Wolens*, 513 U.S. at 226-228, were consumer fraud laws enacted pursuant to traditional state police power. See *California* v. *Zook*, 336 U.S. 725, 734 (1949) (protecting consumers from fraud is a well-established police power).

The FAAA Act's explicit delineation of exceptions to the preemption provisions precludes the categorical police powers exception envisioned by petitioner. Congress clearly considered traditional areas in which the States might exercise regulatory authority over carriers and specified which of those areas were not subject to preemption (motor vehicle safety, route controls for specified purposes, insurance requirements, and the transportation of household goods). 49 U.S.C. 14501(c)(2), 41713(b)(4)(B); see H. Rep. 677, at 84, 85. Petitioner does not contend that the Tobacco Delivery Law fits within any of those exceptions. Rather, relying on a statement in the legislative history that the list of "[m]atters not covered" by the preemption provisions was "not intended to be all inclusive," petitioner contends that the listed exceptions are merely illustrative of a general rule that the statute does not preempt noneconomic regulation. Pet. 22 (quoting H. Rep. 677, at 84). That argument is misconceived.

The text of the preemption provisions states that "*[e]xcept as provided in*" specified provisions, a State "may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service" of a carrier. 49 U.S.C. 14501(c)(1), 41713(b)(4)(A). It would make no sense for Congress to preempt state law "except as provided in" specified provisions that narrowly define areas in which States were to

retain authority if Congress had meant to incorporate a categorical exception for all noneconomic State regulation. For example, it is telling that, whereas Congress specified that States may regulate the transportation of one particular commodity—household goods—it did not include an exception for other items or for tobacco in particular. When Congress creates exceptions in a statute, courts have no authority to create others; rather, "[t]he proper inference * * * is that Congress considered the issue of exceptions and, in the end, limited the statute to the ones set forth." *United States* v. *Johnson*, 529 U.S. 53, 58 (2000).

The areas in which Congress specified that States may undertake regulation for safety and related purposes are ones in which other Acts of Congress explicitly or impliedly allow for state regulation. See 49 U.S.C. 5112 (highway routing of hazardous materials); 49 U.S.C. 31111(f) (motor vehicle length limitations); 49 U.S.C. 31114(b) (commercial motor vehicle access to interstate and federal aid highways); 49 U.S.C. 31138 (2000 & Supp. IV 2004) and 49 U.S.C. 31139 (minimum motor carrier financial responsibility). Significantly, whereas Congress expressly permitted States to enact safety regulations with respect to motor vehicles, it at the same time provided the Secretary of Transportation with authority to override those state laws. 49 U.S.C. 31141. Petitioner urges the Court to engraft a broader, non-textual exception for all state safety regulations, but with no corresponding authority in the Secretary of Transportation to preempt such laws.

A general exception for state regulation of motor carriers on safety grounds would make major inroads on the FAAA Act's general rule of preemption. Tellingly, petitioner's position quickly progresses to its logical endpoint: "So long as the state law is not intended to regulate the economics of the carriers, such as setting rates or establishing tariffs, there is no preemption under the FAAAA." Pet. 23. That contention simply rephrases the argument rejected by this Court in *Morales* that the

ADA preempts only state laws "actually prescribing rates, routes, or services." 504 U.S. at 385.

Thus, although the legislative history identifies "[s]tate economic regulation of motor carrier operations" as the principal focus of the FAAA Act's preemption provisions, H. Rep. 677, at 87, the "related to" terminology in the statute's text belies the notion that that was Congress's *only* concern.[3]

2. Petitioner erroneously suggests (Pet. 18-19) that the Court should infer an exception to state laws addressed to combating tobacco use by minors because such laws share a "common purpose[]" with federal law. Pet. 19 (quoting *PhRMA* v. *Walsh*, 538 U.S. 644, 666 (2003)). Although the Federal Government shares the State's interest in combating youth tobacco use, Congress has not authorized States to enact laws within the scope of the FAAA Act's preemption provision in furtherance of that goal.

The "Synar Amendment" in the ADAMHA Reorganization Act, Pub. L. No. 102-321, § 202, 106 Stat. 394, to which petitioner refers (Pet. 18), provides that the Secretary of Health and Human Services (HHS) "may" award a grant to any State that "has 'in effect a law providing that it is unlawful for any manufacturer, retailer, or distributor of tobacco products to sell or distribute

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[3] Petitioner's reliance (Pet. 20-21) on *City of Columbus* v. *Ours Garage & Wrecker Services, Inc.*, 536 U.S. 424 (2002), is misplaced for similar reasons. That case concerned whether the State's regulatory authority over local tow-truck operations, preserved in 49 U.S.C. 14501(c)(2)(A), could be delegated to municipalities. 536 U.S. at 428. In that quite different context, the Court observed that "[t]he problem to which the congressional conferees attended was '[s]tate *economic* regulation'; the exemption in question is for state *safety* regulation." *Id.* at 440-441 (quoting H. Rep. 677, at 87). Nothing in that brief comment or elsewhere in *Ours Garage* suggests a retreat from the broad interpretation of the preemption provision in *Morales*; in fact, the meaning of "related to" in the general rule of preemption in 49 U.S.C. 14501(c)(1) was not even at issue in *Ours Garage*. Nor did the Court suggest that Congress had provided a broad exemption for *all* state safety regulation, beyond the listed exceptions.

any such product to any individual under the age of 18." 42 U.S.C. 300x-26(a)(1). By its terms, the Synar Amendment does not mandate state laws related to motor carrier services regarding tobacco products.[4] And the focus of HHS's regulation that implements the Synar Amendment is on restricting over-the-counter and vending machine sales. See 45 C.F.R. 96.130. The court of appeals therefore correctly concluded that the FAAA Act and Synar Amendment "can exist harmoniously because the states may pass laws to curb underage smoking without passing laws 'related to' carrier prices, routes, or services." Pet. App. 21 n.12.[5]

Indeed, the court of appeals' decision leaves in place other provisions of the Tobacco Delivery Law (and leaves open the possibility of other laws) that do prohibit all persons (including carriers) from knowingly providing tobacco products to minors. As discussed above, see p. 5, *supra*, the court of appeals expressly upheld the first sentence of Section 1555-D, which bars any person from knowingly delivering contraband tobacco. Pet. App. 25. The court of appeals' decision also leaves in place (and respondents did not even challenge) the State's general prohibition that "[a] person may not sell, furnish, give away or offer to sell, furnish or give away a tobacco product to any person under 18 years of age." 22 Me. Stat. § 1555-B(2) (Supp. 2006). On its

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[4] The Synar Amendment's reference to a "distributor of tobacco products," construed in context and in accordance with the ordinary meaning of those words, refers to a wholesaler of such products, rather than a carrier that transports the products. That interpretation is also consistent with the use of the terms "distributed" and "distributor" in Maine's Tobacco Delivery Law. See, *e.g.*, 22 Me. Stat. § 1555-B(4) and (6) (Supp. 2006); *id.* § 1555-D (2004).

[5] Notably, even before enactment of the statutory provisions here at issue in 2003, Maine's law generally prohibiting tobacco sales to minors qualified the State for a Synar Amendment grant, and the State easily satisfied HHS's target rate of no more than 20% sales-to-minors violations. See *State Synar Non-Compliance Rate Table, FFY 1997 - FFY 2005* (visited May 24, 2007) <http://prevention. samhsa.gov/tobacco/synartable_print.htm>.

face, that provision would appear to apply to a carrier (just as to any other "person") who "furnish[es]" tobacco products to a minor.[6] Other States have banned outright the direct shipment of cigarettes to individual consumers. Cal. Amicus Br. 5; see, *e.g.*, Md. Code Ann., Bus. Reg. § 16-222 (2004); *id.* § 16-223 (Supp. 2006); Ark. Code Ann. § 26-57-203 (LexisNexis Supp. 2005); *id.* § 26-57-215 (Michie 1997). See *Arkansas Tobacco Control Bd.* v. *Santa Fe Natural Tobacco Co.*, 199 S.W.3d 656 (Ark. 2004) (upholding, against a dormant Commerce Clause challenge, a ban on non face-to-face retail sales of cigarettes); *Brown & Williamson Tobacco Corp.* v. *Pataki*, 320 F.3d 200 (2d Cir. 2003) (same).[7] Such laws, which do not dictate how carriers must provide service, do not have a "forbidden significant effect" so as to warrant preemption. See also pp. 11-12, *supra*.

3. Petitioner's reliance on *Granholm* v. *Heald*, 544 U.S. 460 (2005), Pet. 20, is misplaced. There, the Court struck down, as unconstitutional under the Commerce Clause, state statutes that prohibited or restricted out-of-state wineries from shipping wine directly to in-state consumers. In concluding that the States had failed to justify such discriminatory regulation, the Court noted that there were other measures States could undertake to prevent minors from obtaining wine by mail: "For example, the Model Direct Shipping Bill developed by the National Conference of State Legislatures requires an adult signature on delivery and a label so instructing on each package." 544 U.S. at 491.

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[6] Maine's liquor laws similarly prohibit the "knowing[]" delivery of liquor to a minor; however, in contrast to the Tobacco Delivery Law, they do not prescribe particular procedures with which carriers must comply or services that they must offer in order for retailers to utilize their services. 28-A Me. Rev. Stat. Ann. §§ 2073(3)(B), 2077(3), 2081(1)(A) (West 2007).

[7] In connection with litigation, the three major commercial carriers, UPS, FedEx, and DHL, entered into settlement agreements with New York pursuant to which the carriers agreed not to ship cigarettes to individual customers in the United States. See Pet. 12.

The Court's passing statement in *Granholm* did not address preemption under the FAAA Act. Moreover, that provision of the Model Direct Wine Shipment Bill differs in significant respects from the Tobacco Delivery Law provisions here at issue. Unlike Section 1555-C(3)(C), it does not mandate that wine shippers use only carriers that provide certain specified services that would require carriers to alter their usual distribution and delivery procedures or offer an idiosyncratic service. Rather, the Model Bill would impose on shippers an obligation to label conspicuously the package as containing alcohol and to select a delivery service that would require the signature of a person over 21 years of age.[8] To the extent such an adult-only-signature service is commercially available, a state law requiring shippers to utilize such a service would not, as we discuss above, see p. 11, *supra*, be a law "related to" motor carriers.

D. The court of appeals' decision does not, in any event, conflict with a decision of any other appellate court. Petitioner contends that the court of appeals' decision is inconsistent with the Ninth Circuit's decision in *Californians for Safe & Competitive Dump Truck Transp.* v. *Mendonca*, 152 F.3d 1184, 1189 (1998), cert. denied, 526 U.S. 1060 (1999) and the Second Circuit's in *Ace Auto Body & Towing, Ltd.* v. *City of New York*, 171 F.3d 765, cert. denied, 528 U.S. 868 (1999). There is no conflict.

In *Mendonca*, the Ninth Circuit held that California's Prevailing Wage Rate Law (CPWL)—a law of general applicability, not specifically directed to employers in the transportation business—has only an "indirect, remote, and tenuous" effect on motor

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[8] Section 3(c) of the Model Direct Wine Shipment Bill (1997) states: "All Wine Direct Shipper Licensees shall * * * [e]nsure that all containers of wine shipped directly to a resident in this state are conspicuously labeled with the words 'CONTAINS ALCOHOL: SIGNATURE OF PERSON AGE 21 OR OLDER REQUIRED FOR DELIVERY.'" See *Model Direct Wine Shipment Bill* (visited May 24, 2007) <www.wineinstitute.org/programs/shipwine/Model_Direct_Shipping_Bill.pdf>.

carrier prices, routes, and services, and, thus, is not preempted by the FAAA Act. 152 F.3d at 1189. Although the Ninth Circuit acknowledged that the CPWL would likely have some effect on carrier prices and operations, such effect would be indirect and would not "*acutely* interfer[e]" with the carriers' discretion in how they conduct their fundamental operations. *Ibid.* The Tobacco Delivery Law, by contrast, specifies particular procedures for carriers to follow. Notably, the First Circuit saw no inconsistency between its decision and *Mendonca*, which the court cited favorably six times, including as authority for upholding the first sentence of Section 1555-D. See Pet. App. 25-26.

Ace Auto Body, on the other hand, is entirely inapposite. In that case, the Second Circuit rejected New York City's argument that a city ordinance regulating the towing of disabled vehicles was not within the general rule of preemption, 171 F.3d at 771, and proceeded to the "principal question" whether the ordinance was "saved from preemption by language in § 14501(c)(2)(A), which preserves the 'safety regulatory authority of a State with respect to motor vehicles.'" *Id.* at 772. The court's holding that the phrase "safety * * * with respect to motor vehicles" encompassed the city's scheme to tow abandoned and stolen cars and to eliminate the practice of towers "chasing" accidents (*id.* at 774-775) has no relevance to the question presented here regarding the preemptive scope of the FAAA Act's general rule with respect to the Tobacco Delivery Law.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General

PETER D. KEISLER
Assistant Attorney General

EDWIN S. KNEEDLER
Deputy Solicitor General

DOUGLAS HALLWARD-DRIEMEIER
Assistant to the Solicitor General

MARK B. STERN
CHRISTINE N. KOHL
Attorneys

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In The
Supreme Court of the United States

G. STEVEN ROWE, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF THE STATE OF MAINE,

Petitioner,

v.

NEW HAMPSHIRE MOTOR TRANSPORT ASSOCIATION, MASSACHUSETTS MOTOR TRANSPORTATION ASSOCIATION, INC., and VERMONT TRUCK & BUS ASSOCIATION, INC.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

BRIEF AMICUS CURIAE OF THE STATE OF CALIFORNIA AND 35 OTHER STATES IN SUPPORT OF THE PETITION

BILL LOCKYER
Attorney General of the
State of California
THOMAS J. GREENE
Chief Assistant Attorney General
DENNIS ECKHART
Senior Assistant Attorney General
LAURA KAPLAN
Deputy Attorney General
Counsel of Record
1300 I Street
P.O. Box 944255
Sacramento, CA 94244-2550
Telephone: (916) 323-3822
Fax: (916) 323-0813

Counsel for Amicus Curiae

[Additional Counsel Listed On Inside Cover]

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

TROY KING
Attorney General
State of Alabama
11 South Union Street
Montgomery, AL 36130

DAVID W. MARQUEZ
Attorney General
State of Alaska
P.O. Box 110300
Juneau, AK 99811

TERRY GODDARD
Attorney General
State of Arizona
1275 West Washington
Phoenix, AZ 85007-2926

MIKE BEEBE
Attorney General
State of Arkansas
323 Center Street
Little Rock, AR 72201

RICHARD BLUMENTHAL
Attorney General
State of Connecticut
55 Elm Street
Hartford, CT 06106

CARL C. DANBERG
Attorney General
State of Delaware
820 N. French Street
Wilmington, DE 19801

MARK J. BENNETT
Attorney General
State of Hawaii
425 Queen St.
Honolulu, HI 96813

LAWRENCE G. WASDEN
Attorney General
State of Idaho
P.O. Box 83720
Boise, ID 83720-0010

LISA MADIGAN
Attorney General
State of Illinois
100 West Randolph St.,
12th Flr.
Chicago, IL 60601

STEVE CARTER
Attorney General
State of Indiana
402 West Washington St.,
5th Flr.
Indianapolis, IN 46204

THOMAS J. MILLER
Attorney General
State of Iowa
Hoover Bldg. Second Flr.
Des Moines, IA 50319

GREG STUMBO
Attorney General
State of Kentucky
State Capitol, Room 116
Frankfort, KY 40601

CHARLES FOTI
Attorney General
State of Louisiana
P.O. Box 94005
Baton Rouge, LA 70804-9005

J. JOSEPH CURRAN, JR.
Attorney General
State of Maryland
200 St. Paul Place
Baltimore, MD 21202

THOMAS F. REILLY
Attorney General
State of Massachusetts
One Ashburton Place
Boston, MA 02108

MICHAEL A. COX
Attorney General
State of Michigan
P.O. Box 30212
Lansing, MI 48909

MIKE HATCH
Attorney General
State of Minnesota
102 State Capitol
St. Paul, MN 55101-2127

JIM HOOD
Attorney General
State of Mississippi
P.O. Box 220
Jackson, MS 37205-0220

MIKE MCGRATH
Attorney General
P.O. Box 201401
Helena, MT 59620-1401

JEREMIAH W. (JAY) NIXON
Attorney General
State of Missouri
207 West High Street
Jefferson City, MO 6501

RAY COOPER
Attorney General
State of North Carolina
P.O. Box 629
Raleigh, NC 27602-0629

BRIAN SANDOVAL
Attorney General
State of Nevada
100 North Carson Street
Carson City, NV 89701

JIM PETRO
Attorney General
State of Ohio
30 E. Broad Street, 17th Flr.
Columbus, OH 43215

W.A. DREW EDMONDSON
Attorney General
State of Oklahoma
313 N.E. 21st Street
Oklahoma City, OK
73105-4894

HARDY MYERS
Attorney General
State of Oregon
1162 Court St. N.E.
Salem, OR 97301

ROBERTO J. SANCHEZ-RAMOS
Attorney General
Commonwealth of
Puerto Rico
GPO Box 902192
San Juan, PR 00902-0192

PATRICK C. LYNCH
Attorney General
State of Rhode Island
150 South Main Street
Providence, RI 02903

LAWRENCE E. LONG
Attorney General
State of South Dakota
1302 E. Highway 14, Suite 1
Pierre, SD 57501-8501

HENRY MCMASTER
Attorney General
State of South Carolina
P.O. Box 11549
Columbia, SC 29211

PAUL G. SUMMERS
Attorney General
State of Tennessee
P.O. Box 20207
Nashville, TN 37202-0207

MARK L. SHURTLEFF
Attorney General
State of Utah
East Office Bldg., Suite 320
Salt Lake City, UT
84114-2320

WILLIAM H. SORRELL
Attorney General
State of Vermont
109 State Street
Montpelier, VT 05609-1001

ROB MCKENNA
Attorney General
State of Washington
P.O. Box 40100
Olympia, WA 98504-0100

DARREL V. MCGRAW, JR.
Attorney General
State of West Virginia
State Capitol, Room 26-E
Charleston, WV 25305

PATRICK J. CRANK
Attorney General
State of Wyoming
State Capitol Bldg.
Cheyenne, WY 82002

QUESTIONS PRESENTED

1. Whether the Federal Aviation Administration Authorization Act of 1994 ("FAAAA"), 49 U.S.C. §§ 14501(c)(1) and 41713(b)(4)(A), preempts states from exercising their historic public health police powers to regulate carriers that deliver contraband such as tobacco and other dangerous substances to children; and

2. Whether the FAAAA preempts states from exercising their historic public health police powers to require shippers of contraband such as tobacco and other dangerous substances to utilize a carrier that provides age verification and signature services to ensure that such substances are not delivered to children.

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INTEREST OF AMICI

Amicus State of California and the other amici states urge the Court to grant certiorari in this case. The First Circuit held that federal law preempts a Maine statute that is designed to curb tobacco sales to children by requiring carriers to comply with modest delivery and labeling restrictions. Unless reversed, the decision will undermine the most effective and practical tool that states employ to restrict illegal sales of tobacco to children over the Internet.

Internet tobacco sites have increased more than eight-fold in recent years. Unfortunately, a majority of online tobacco retailers violate state laws that bar tobacco sales to children. Online sellers simply do not enforce age restrictions. States have been working together on aggressive law enforcement strategies to quell this insidious problem. Several have sued Internet tobacco retailers who flout state laws prohibiting or severely restricting the transport and delivery of tobacco products to their citizens.

The most effective method to prevent illegal sales to children via the Internet and other non-face-to-face means, however, is to regulate the carriers that transport and deliver the products. Statutes such as Maine's Tobacco Delivery Law thwart minors attempting to purchase cigarettes or other tobacco products over the Internet by requiring carriers to comply with simple delivery and age-verification requirements when a package is labeled as "tobacco." At least 29 states prohibit or severely restrict the direct delivery of tobacco products to consumers purchased from Internet vendors.

The decision below undercuts these laws by declaring that the FAAAA preempts much of Maine's scheme.

Moreover, the lower court's selective reading of this Court's preemption cases not only threatens other states' tobacco laws, but also threatens state restrictions on the delivery of other dangerous products that have been traditionally regulated under states' police powers, including guns, liquor, drugs, pornography, tear gas, and wild animals.

The amici states urge the Court to grant the writ of certiorari requested by the Attorney General of Maine and clarify this significant area of preemption law.

REASONS TO GRANT THE PETITION

1. THE STATES' ABILITY TO REGULATE THE TRANSPORTATION AND DELIVERY OF TOBACCO PRODUCTS IS CRUCIAL TO CURB RAMPANT ILLEGAL TOBACCO SALES TO MINORS

The Court has recognized that "tobacco use, particularly among children and adolescents, poses perhaps the single most significant public health problem in the United States." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 161 (2000). This problem has become substantially more difficult to solve due to the recent boom in sales of tobacco products over the Internet.

Illegal Internet tobacco sales have reached epidemic proportions. The number of Internet cigarette vendors has risen from 88 in January 2000 to 772 in January 2006.[1] Unlike purchasing tobacco products in a brick-and-mortar

[1] Ribisl KM, Kim AE, Williams RS. Sales and marketing of cigarettes on the Internet: Emerging threats to tobacco control and promising policy solutions *in Reducing tobacco use: Strategies, barriers, and consequences.* Washington, D.C.: National Academy Press; In press.

store, where the seller can look the person in the eye and carefully examine the customer's government identification to ensure that the person is of legal age to purchase tobacco products, there is no standard, reliable method of online age-verification. The vast majority of Internet cigarette vendors simply do not prevent youths from purchasing cigarettes online. While 79.7% of vendors include minimum age warnings on their home pages, only 26.7% feature them at the top of the page where they can be viewed without scrolling, the prevailing standard for Web design.[2] Such warnings are no substitute for valid age-verification procedures, and many of these warnings are likely to be missed by users. Internet cigarette vendors commonly use self-verification methods, asking users to type in a birth date (used by 18.8% of vendors) or stating a disclaimer that by submitting an order, the customer is certifying that he/she is of legal age to purchase cigarettes (used by 31.5% of vendors). Only a handful of vendors use minimally adequate age-verification methods, such as requiring the submission of a photo ID (used by 7.7% of vendors) or age-verification at delivery (used by 10.1% of vendors).[3] California conducted an investigation that exposed the significant problem with Internet tobacco sales. Children visited 234 web sites and were able to purchase a carton of cigarettes from 129 sites. Only a few Internet retailers did anything more than ask the

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[2] Williams RS. Youth access to cigarettes online: *Advertised and actual sales practices of Internet cigarette vendors* [Dissertation]. Chapel Hill: health Behavior and Health Education, University of North Carolina of Public Health; 2005.

[3] *Id.*

prospective purchaser to state that he or she was at least 18 years old.[4]

In response, at least 25 states, including Maine, severely restrict Internet tobacco sales to consumers.[5]

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[4] Sting conducted in 2001 by San Diego State University researchers retained by the California Attorney General's Office involving 30 underage decoys.

[5] Alaska (ALASKA STAT. § 43.50.105 (Michie 2005)); Arizona (ARIZ. REV. STAT. ANN. § 42-3221 (West 2006)); California (CAL. BUS. & PROF. CODE § 22963 & CAL. REV. & TAX. CODE § 30101.7 (West 2006)); Delaware (DEL. CODE ANN. TIT. 30 § 5361 (West 2006)); Hawaii (HAW. REV. STAT. ANN § 245-16 (Michie 2005)); Idaho (IDAHO CODE § 39-5714 (West 2006)); Illinois (720 ILL. COMP. STAT. ANN. 678/5 (West 2006); Indiana (IND. CODE ANN. § 24-3-5-5 (West 2006)); Louisiana (LA. REV. STAT. ANN. § 47:872 (West 2006)); Michigan (MICH. COMP. LAWS ANN. § 205.431 (West 2006)); Minnesota (MINN. STAT. ANN. §§ 325F.781 and 297F.031 (West 2006)); Missouri (MO. ANN. STAT. §§ 407.924 to 407.926, and 407.934 (West 2006)); Mississippi (MISS. CODE ANN. §§ 97-32-3 and 97-32-5 (West 2006)); Montana (MONT. CODE ANN. §§ 16-11-102, 16-11-104, 16-11-128, 16-11-129, 16-11-131, 16-11-142 and 16-11-148 (West 2005)); Nevada (NEV. REV. STAT. §§ 370.0285, 370.321 to 370.329, and 370.425 (West 2005)); Ohio (OHIO REV. CODE ANN. §§ 2927.023, 5743.01, 5743.15, 5743.16, 5743.20 and 5743.71 (West 2005-2006)); Oklahoma (OKLA. STAT. ANN. TIT. 68 §§ 301, 304 and 317.1 et seq. (West 2006)); Oregon (OR. REV. STAT. §§ 323.500 and 323.700 et seq. and 323.482 (West (2005)); Pennsylvania (PA. STAT. AND CONS. STAT. ANN. § 231-A (West 2006)); Rhode Island (R.I. GEN. LAWS § 44-20.1 to 44.20-9 and 11-9-13.4 (West 2005)); South Dakota (S.D. CODIFIED LAWS §§ 10-50-93 et seq. (West 2006)); Tennessee (TENN. CODE ANN. §§ 67-4-1001 and 67-4-1029 (West 2006)); Texas (TEX. HEALTH & SAFETY CODE §§ 161.451 to161.462 (Vernon 2006)); Utah (UTAH CODE ANN. § 76-10-105.1 (West 2006)); Virginia (VA. CODE ANN. §§ 18.2-246.6 to 18.2.2-246.15 (West 2006)); Washington (WASH. REV. CODE ANN. § 70.155.105 (West 2006)); West Virginia (W. VA. CODE §§ 16-9E-1 to 19-9E-7 (West 2006)); Wyoming (WYO. STAT. ANN. §§ 39-18-101, 39-18-106 and 39-18-108 (Michie 2006)).

Although states differ in the restrictions they impose, typically they provide that:

> 1. Retailers at the time of the sale, and/or carriers upon delivery, must verify that the purchaser is an adult;
>
> 2. Retailers must be licensed by the state; and
>
> 3. Containers must be labeled as containing cigarettes or tobacco products.

Four states, Connecticut, New York, Maryland and Arkansas, have banned outright the delivery and sale of cigarettes to individual consumers.[6]

The First Circuit decision undercuts these laws. If the First Circuit's construction of the FAAAA stands, the states may lose their most effective means of preventing children from purchasing tobacco products over the Internet.

2. THE DECISION BELOW CREATES SUBSTANTIAL UNCERTAINTY REGARDING STATES' ABILITY TO PROSECUTE VIOLATORS OF LAWS REGULATING THE TRANSPORT AND DELIVERY OF TOBACCO PRODUCTS

The First Circuit held that Maine's ban on the *knowing* delivery of contraband tobacco is not preempted by the FAAAA even though it pertains to carrier services because

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[6] CONN. GEN. STAT. ANN. § 12-285c (West 2006); N.Y. PUBLIC HEALTH LAW § 1399-*ll* (McKinney 2005); MD. CODE ANN. (BUS. REG.) §§ 16-222 AND 16-223(b)(1) (West 2006); ARK. CODE ANN. §§ 26-57-203 AND 26-57-215 (Michie 2006).

the provision requires only that carriers do not act as knowing accomplices in the illegal sale of tobacco products, and it does not require carriers to modify their delivery methods other than by declining to transport products that Maine legitimately banned. *New Hampshire Motor Transport Ass'n v. Rowe*, 448 F.3d 66, 80 (1st Cir. (Me.) May 19, 2006). By contrast, the court determined that the provision imputing knowledge to the carrier – that it was delivering contraband tobacco products from the markings or labels on the package – was preempted because that provision would impact the uniform operations of the carrier by requiring reading and comprehending the labels and markings.

The First Circuit's ruling is ambiguous and contradictory and puts the states in a quandary about which laws will run afoul of the constitution and which ones will not. The import of the decision is to take away the only effective and identified means by which the states can prove violations of their tobacco delivery laws imputing knowledge to the carrier from the markings or labels on the package. Prohibiting states from proving that carriers know they are delivering tobacco products to children when the delivery containers are clearly labeled as containing tobacco products hamstrings the states' ability to prosecute sellers of contraband tobacco over the Internet. For example, California regulates non-face-to-face tobacco sales. Business & Professions Code section 22963 primarily regulates the conduct of retailers, but also provides for enforcement against carriers if they deliver tobacco products with reason to know the package's contents.

> For the purposes of enforcement of this section pursuant to Section 22958, the acts of the United States Postal Service or other common carrier

> when engaged in the business of transporting and delivering packages for others ... who transports or delivers a package *without any reason to know of the package's contents*, are not unlawful and are not subject to civil penalties.

Section 22963, subdiv. (d); italics added.

One way to prove that the carrier did have knowledge of the package's contents is to impute knowledge to the carrier if the package is marked, as required by California Revenue & Taxation Code § 30101.7, to contain cigarettes. According to the First Circuit, however, if a carrier delivers a package labeled as containing cigarettes to a child, law enforcement officials could not prevail against the carrier in an action alleging violations of the age-verification provisions of section 22963, based on imputed knowledge that the package contains cigarettes.

Moreover, the First Circuit's decision may well jeopardize state laws that ban the transport or delivery of tobacco products outright. The court held that the knowing delivery of tobacco products is not preempted by the FAAAA, because carriers need not modify their delivery methods other than by declining to transport a product the state has legitimately banned. *New Hampshire Motor Transport Ass'n v. Rowe*, 448 F.3d 66, 80. As a practical matter, however, the way to prove a carrier *knowingly* delivered tobacco products is to impute knowledge to the carrier if the package was labeled "cigarettes" or "tobacco" and by the fact that the package was delivered to a consumer as opposed to one of the excepted persons – e.g., a state-licensed tobacco distributor or retailer – set forth in the statute. The First Circuit's decision effectively nullifies state statutes banning outright the delivery of tobacco products because states are prohibited from using the only

practical means they have to prove violation of these laws. Simply put, under the First Circuit's analysis even statutes banning the *knowing* delivery of contraband tobacco might not pass constitutional muster in application, unless the basis of the *knowing* violation is that the carrier was specifically told that the package contained tobacco products and, despite that knowledge, delivered them anyway – an unlikely scenario.

3. THE DECISION BELOW CALLS INTO QUESTION STATE HEALTH AND SAFETY LAWS TOUCHING ON THE TRANSPORT AND DELIVERY OF A MYRIAD OF DANGEROUS PRODUCTS

The First Circuit's ruling, that the FAAAA preempts Maine's Tobacco Delivery Law, is especially troubling because its reasoning is not limited to tobacco. It jeopardizes states' enforcement efforts in other health or safety-related areas and has the potential to change the entire landscape of regulating transportation and delivery of dangerous products.

All across the nation states have enacted laws barring or regulating the transport and delivery of dangerous or contraband products including such diverse items as tear gas and tear gas weapons,[7] weapons,[8] used bee supplies that could create a disease hazard,[9] fur, hair, skin or flesh

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[7] CAL. BUS. & PROF. CODE § 17533.9 (West 2006).

[8] ARIZ. REV. STAT. ANN. § 13-3102 (West 2006).

[9] ALA. CODE § 2-14-5 (West 2006).

of domesticated dogs or cats,[10] alcoholic beverages,[11] fuel,[12] wild animals,[13] pornography,[14] and prescription drugs.[15] The First Circuit's ruling calls into question each and every one of these laws.

One type of law put at risk by the First Circuit's decision is the Model Direct Shipping Bill, developed by the National Conference of State Legislatures, which requires an adult signature for the delivery of wine and a label so instructing on each package. The importance of this model law was emphasized by the Court in *Granholm v. Heald,* 544 U.S. 460 (2005), a case invalidating two states' laws regulating the sale and importation of wine as violative of the Commerce Clause. The Court responded to the state's claim that direct shipping of wine increases the risk of underage drinking by noting that the states can take less restrictive steps to minimize the risk that minors will order wine by mail. The Court suggested that the states could, for example, adopt the Model Direct Shipping Bill to minimize the risk. Under the First Circuit's analysis, the states' ability to invoke this procedure to protect children from receiving wine by mail would likely be preempted because, like Maine's Tobacco Delivery Law, the statute "relates to" carrier services.

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[10] N.Y. AGRIC. & MKTS. LAW § 96-h (West 2006).

[11] MASS. GEN. LAWS ANN. ch. 138, § 22 (West 2006)

[12] FLA. STAT. Ann. § 206.20 (West 2006).

[13] OHIO REV. CODE ANN. § 1533.31 (West 2005-2006).

[14] HAW. REV. STAT. ANN. § 707-751 (Michie 2005).

[15] FLA. STAT. ANN. § 499.028 (West 2006).

4. THE COURT SHOULD TAKE THIS CASE TO RESOLVE THE CONFLICT BETWEEN THE BROAD, UNWORKABLE PREEMPTION STANDARD OF THE *MORALES* CASE AND THE PRACTICAL, NARROW RULE OF THE ERISA CASES

As argued in section II of Maine's Petition for a Writ of Certiorari, the First Circuit's overly expansive, impractical reading of the preemption provision of the FAAAA, based on this Court's construction of an identical provision in the Airline Deregulation Act of 1978 (ADA) in *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374 (1992), conflicts with the narrower interpretation the Court has adopted in cases decided after *Morales* that analyze the Employee Retirement Income Security Act of 1974 (ERISA), including *New York State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.,* 514 U.S. 645 (1995) and *Cal. Div. of Labor Standards Enforcement v. Dillingham Construction, N.A.*, 519 U.S. 316 (1997).

The *Morales* standard should not be applied to preempt Maine's Tobacco Delivery Law because after deciding *Morales,* this Court determined that the broad, expansive preemption standard of the *Morales* case was unworkable, and according to Justices Scalia and Ginsberg, "doomed to failure." *Dillingham*, 519 U.S. at 335 (Scalia, J., concurring). The First Circuit, however, rejected this Court's reasoning in *Dillingham* stating that "[I]f developments in pension law have under-cut holdings in air-transportation law, it is for the Supreme Court to make the adjustments." *New Hampshire v. Rowe,* 448 F.3d 66, 76.

The Court should accept the First Circuit's invitation to decide the appropriate standard to be applied in this case. Specifically, the Court should decide whether to use the virtually limitless, dictionary definition of "relating to" – set forth in *Morales* as any state law having a "connection with or a reference to" airline rates, routes, or services – or instead the practical approach that the Court took in the ERISA cases. Under the latter approach, courts would consider the objectives of the statute and the nature and effect of the state's law when determining whether the FAAAA preempts the state's law. *California Div. of Labor Standards Enforcement v. Dillingham Construction, Inc.* 519 U.S. 316, 325. Unless the Court accepts this case for review and decides which standard is appropriate, the potential for chaos is great because the states cannot tell whether their tobacco delivery laws will be preempted based on the broad brush strokes of *Morales*, or whether they will pass constitutional muster based on the narrower, more practical standard of the ERISA cases. Statutes that have only a tenuous, remote, or peripheral connection with rates, routes and services should not be preempted. The First Circuit's decision calls into question the constitutionality of each and every state statute regulating the transportation and delivery of tobacco and other illegal or dangerous products.

CONCLUSION

The amici states urge the Court to grant the writ of certiorari requested in this case by the Attorney General of the State of Maine.

Dated: October 24, 2006

Respectfully submitted,

BILL LOCKYER
Attorney General of the
State of California

THOMAS J. GREENE
Chief Assistant Attorney General

DENNIS ECKHART
Senior Assistant Attorney General

LAURA KAPLAN
Deputy Attorney General
Counsel of Record

Counsel for Amicus Curiae

64 37 M 813 E

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IN THE

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Petitioner,

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KATHLEEN HOKE DACHILLE *
LEGAL RESOURCE CENTER FOR TOBACCO REGULATION, LITIGATION & ADVOCACY
500 W. Baltimore Street
Baltimore, MD 21201
(410) 706-1294

* Counsel of Record

Counsel for Amicus Curiae

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

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INTEREST OF *AMICUS CURIAE* [1]

Ten entities with significant interest in and expertise on legal issues surrounding tobacco control in the United States

[1] Counsel to the parties took no part in preparing this brief. No person or entity except listed *amicus curiae* contributed financially to the production of this brief. All parties consented in writing to the submission of this brief.

have joined to submit this brief: the Tobacco Control Legal Consortium, the Campaign for Tobacco-Free Kids, the American Lung Association, the American Lung Association of Maine, the American Cancer Society, the American Heart Association, the American Legacy Foundation, Americans for Nonsmokers' Rights, the American Medical Association and the Maine Medical Association. A full description of each *amicus* and its interest in this case is presented at the end of this brief.

ARGUMENT

In *New Hampshire Motor Transport Association v. Rowe*,[2] the First Circuit over-broadly interprets the Federal Aviation Administration Authorization Act of 1994[3] ("FAAAA") as preempting certain provisions of the State of Maine's tobacco delivery legislation and leaves Maine and other states unable to comprehensively reduce the availability of tobacco products to minors. Faced with growing youth access to the Internet, the increasing purchasing power of teens, and a proliferation of online tobacco retailers, states have the obligation and power to effectively regulate online tobacco retailers. Imposing requirements on the marking and delivery of packages containing tobacco products is an integral component of such regulation. Because the economic-centric FAAAA should not be read so broadly as to sharply curtail the states' public health authority properly exercised, this Court should reverse the First Circuit and revive Maine's power to effectively police youth access to tobacco on the Internet.

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[2] 448 F.3d 66 (1st Cir. 2006).

[3] Pub. L. No. 103-305, § 601, 108 Stat. 1569, 1605 (1994).

I. TOBACCO USE IN THE UNITED STATES PRESENTS A SERIOUS NATIONAL PUBLIC HEALTH CRISIS

Youth smoking remains a grave national concern. States have an obligation to prevent minors from obtaining tobacco products. That responsibility can be fulfilled under the states' plenary public health power to pass reasonable laws to reduce youth access to tobacco. Acting within this broad public health power and to fulfill its obligation, in 2003, Maine passed legislation regulating retailers who sell tobacco via the Internet and mail or phone order venues.[4] The ultimate goal of the legislation is to reduce youth access to cigarettes and thereby reduce youth smoking prevalence.

Tobacco use continues to be the leading preventable cause of death in the United States, accounting for an estimated 440,000 deaths each year.[5] In addition, for every one person who dies as a result of a smoking-related disease, twenty more people suffer from at least one serious illness due to smoking.[6] In an ongoing effort to investigate the health effects of smoking, the U.S. Surgeon General has repeatedly concluded that smoking causes a substantial number of diseases and other adverse health effects.[7] The list of cancers, cardiovascular and respiratory diseases, reproductive effects, and other health conditions associated with smoking, as

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[4] L.D. 1236 (121st Maine Leg.) (codified at ME. REV. STAT. ANN. tit. 22 §§ 1551, 1555-C, & 1555-D (West 2004)).

[5] U.S. DEP'T OF HEALTH & HUMAN SERVICES, THE HEALTH CONSEQUENCES OF SMOKING: A REPORT OF THE SURGEON GENERAL 9 (2004) [hereinafter HEALTH CONSEQUENCES].

[6] U.S. DEP'T OF HEALTH & HUMAN SERVICES, CENTERS FOR DISEASE CONTROL & PREVENTION, CIGARETTE SMOKING – ATTRIBUTABLE MORBIDITY – UNITED STATES, 2000 MORBIDITY AND MORTALITY WEEKLY REPORT (2003), *available at* http://www.cdc.gov/mmwr/preview/mmwrhtml/mm5235a4.htm.

[7] HEALTH CONSEQUENCES, *supra* note 5, at 1 (executive summary).

identified by the Surgeon General over the past 43 years, is far too long to enumerate here.[8] Further, the Surgeon General has concluded that smoking harms nearly every bodily organ and generally diminishes the overall health of smokers.[9]

The national public health crisis resulting from tobacco use is perpetuated by the tobacco industry's success in addicting America's children. A majority of tobacco users initiate use before age eighteen.[10] An estimated 4,000 kids try their first cigarette each day, and about 416,000 minors enter the ranks of daily smokers every year.[11] The Centers for Disease Control and Prevention (CDC) reports that about thirteen percent of middle school students and twenty-eight percent of high school students are current tobacco users.[12] Cigarette smoking is by far the most common form of tobacco use exhibited

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[8] *Id.* at 2-6 tbl.1.1. Most recently, the Surgeon General expanded that list to include the following newly discovered smoking-attributable diseases: abdominal aortic aneurysms, acute myeloid leukemia, cataracts, cervical cancer, kidney cancer, pancreatic cancer, pneumonia, periodontitis, and stomach cancer. *Id.* at 1.

[9] *Id.* at 8.

[10] U.S. DEP'T OF HEALTH & HUMAN SERVICES, PREVENTING TOBACCO USE AMONG YOUNG PEOPLE: A REPORT OF THE SURGEON GENERAL (1994) (executive summary) [hereinafter PREVENTING TOBACCO USE AMONG YOUNG PEOPLE].

[11] Campaign for Tobacco-Free Kids, *Smoking and Kids Factsheet* (2007), *available at* http://tobaccofreekids.org/research/factsheets/pdf/0001.pdf.

[12] U.S. DEP'T OF HEALTH & HUMAN SERVICES, CENTERS FOR DISEASE CONTROL & PREVENTION, YOUTH TOBACCO SURVEILLANCE – UNITED STATES, 2001- 2002 (May 19, 2006), *available at* http://www.cdc.gov/mmwr/preview/ mmwrhtml/ss5503a1. htm [hereinafter YOUTH TOBACCO SURVEILLANCE]. Percentages are based on data collected from 2001 to 2002.

by this vulnerable population.[13] While cigarette smoking among high school students decreased from the late 1990s to 2003, its pervasiveness from 2003 to 2005 remained unchanged.[14]

Smoking at an early age means more exposure to the harmful effects of tobacco and more harm to the smoker. Of all children under eighteen years old living today, an estimated 6.4 million will die prematurely as adults because they began to smoke during adolescence.[15] Accepting the conclusions of the Surgeon General and scores of medical and public health professionals, this Court has recognized that "tobacco use, particularly among children and adolescents, poses perhaps the single most significant threat to public health in the United States."[16]

The CDC has urged states to develop and maintain comprehensive tobacco control programs to reduce tobacco use among youth and routinely evaluates and rates states' programs and recommends improvements.[17] Congress, pursuant to its spending power, has conditioned federal funding of state block grants for substance abuse prevention and treatment on states' enactment and enforcement of youth tobacco

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[13] *Id.* The Centers for Disease Control and Prevention report that 9.8 percent of middle school students and 22.5 percent of high school students currently smoke cigarettes. *Id.*

[14] U.S. DEP'T OF HEALTH & HUMAN SERVICES, CENTERS FOR DISEASE CONTROL & PREVENTION, CIGARETTE USE AMONG HIGH SCHOOL STUDENTS—UNITED STATES, 1991-2005 (July 7, 2006), *available at* http://www.cdc.gov/mmwr/preview/mmwrhtml/mm5526a2.htm.

[15] U.S. DEP'T OF HEALTH & HUMAN SERVICES, CENTERS FOR DISEASE CONTROL & PREVENTION, SUSTAINING STATE PROGRAMS FOR TOBACCO CONTROL DATA HIGHLIGHTS 2004 (2004), *available at* http://www.cdc.gov/tobacco/datahighlights/index.htm.

[16] Food & Drug Admin. v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 161 (2000).

[17] YOUTH TOBACCO SURVEILLANCE, *supra* note 12.

laws.[18] In an attempt to ameliorate the public health crisis caused by smoking and in response to the federal government's instigation, states have taken necessary steps to prevent children and teens from easily obtaining tobacco products from brick-and-mortar retailers like local convenience stores or readily available vending machines.[19] However, states now face a new, more insidious challenge: youngsters easily and increasingly accessing tobacco products from Internet-based retailers.

II. AS YOUTH USE OF THE INTERNET INCREASES AND THE NUMBER OF ONLINE TOBACCO RETAILERS MULTIPLIES, THE STATES' ABILITY TO PREVENT YOUTH ACCESS TO TOBACCO DIMINISHES

Internet use among children and adolescents is widespread and begins at an early age.[20] As a result, children and adolescents today have been referred to as the "Net Generation."[21] Once children reach grades five and six, their level of understanding of the complexity of the Internet matches that of adults.[22] A vast majority of teenagers in the United States—

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[18] Synar Amendment, 106 Stat. 394, P.L. 102-394, July 10, 1992, Sec. 1926, 42 U.S.C. § 300x-26(b)(1) (2000). U.S. Department of Health and Human Services promulgated final regulations in 1996 implementing the Synar Amendment. *See* 45 C.F.R. Part 96.

[19] *See, e.g.*, ME. REV. STAT. ANN. tit. 22 §§ 1555-B(1) (retail sales), § 1555-B(2) (sales to minors prohibited), § 1553-A (vending machines) (West 2004). Maine has had great success in this regard.

[20] U.S. DEP'T OF EDUCATION, NATIONAL CENTER FOR EDUCATIONAL STATISTICS, COMPUTER AND INTERNET USE BY CHILDREN AND ADOLESCENTS IN 2001: STATISTICAL ANALYSIS REPORT 37 (2003).

[21] DON TAPSCOTT, GROWING UP DIGITAL: THE RISE OF THE NET GENERATION 15 (1998).

[22] Zheng Yan, *What Influences Children's and Adolescents' Understanding of the Complexity of the Internet*, 42 Developmental Psychol. 418, 426 (2006).

almost ninety percent of those aged twelve to seventeen—use the Internet, an increase of four million teens since 2000.[23] More than half of these youth say they log on at least once every day and almost one-quarter access the Internet several times daily.[24] Teens' use of the Internet exceeds that of adults by over twenty percent.[25]

Unmonitored access to the Internet is readily available to children and teens. Teenagers can log onto the Internet from home, school, a friend's house, a library, or other locations such as a community center or house of worship.[26] While many parents try to monitor and restrict their children's Internet use by using "filters"—software designed to block

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[23] Amanda Lenhart et al., *Teens and Technology: Youth Are Leading the Transition to a Fully Wired and Mobile Nation*, Pew Internet & American Life Project, at i (2005). *See also* U.S. DEP'T OF COMMERCE, ECONOMICS AND STATISTICS ADMINISTRATION, NAT'L TELECOMMUNICATIONS AND INFORMATION ADMINISTRATION, A NATION ONLINE: HOW AMERICANS ARE EXPANDING THEIR USE OF THE INTERNET (Feb. 2002) 1 (executive summary), *available at* http://www.ntia.doc.gov/ntiahome/dn/anationonline2.pdf; Health Policy Guide, Center for Health Improvement, *Penalties for Illegal Sales to Minors*, *available at* www.healthpolicyguide.org/do.asp?id=3148 ("U.S. Census data show that households with children younger than age 18 are more likely to have Internet access than households without children (62% versus 53%), and that 90% of children between the ages of 5 and 17 used computers in 2001." (citations omitted)).

[24] Lenhart, *supra* note 23, at 4. Fifty-one percent of youth log on daily, up from forty-two percent in 2000. *Id.*

Another study, which sampled 261 seventh and tenth graders from suburban California public schools, found that 91percent of participants used the Internet at home on an occasional or regular basis. Elisheva F. Gross, *Adolescent Internet Use: What We Expect, What Teens Report*, 25 Applied Developmental Psychol. 633, 640 (2004). Between forty and sixty percent of participants reported going online on a random single day within the period of the study. *Id.*

[25] Lenhart, *supra* note 23, at i.

[26] *Id.* at 5.

access to sites parents do not want their children to visit—this software often fails to restrict minors' access to online tobacco retailers' websites.[27]

Not only has youth Internet use grown exponentially, but "the scope of teens' online lives has also broadened" and "intensified,"[28] including making online purchases.[29] Over forty percent of online teens, or nine million youth, have made an Internet purchase.[30] The number of teen online shoppers has grown a strikingly significant seventy-one percent since 2000.[31] Today, "[b]ecoming an online consumer is a rite of passage that many Americans now experience during their teenage years."[32] Hence, "[m]arketing and selling [tobacco products] to minors is almost a logical consequence of Web-based retailing."[33]

As the number of youths logging on to the Internet steadily rises, so too does the number of Internet retailers selling

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[27] *Id.* at 7-8. *Compare* www.cigarettesexpress.com (stating site is registered with parental control software, including CyberSitter™, Net Nanny®, Cyber Patrol®, and Surf Watch) *with* John H. Knowles, Jr. et al., *Internet Sales of Tobacco: Heading Off the New E-pidemic*, 25 J. OF PUB. HEALTH POL'Y, 58, 64 (2004) ("It is hardly a challenge for computer savvy teenagers to find a cyber-café or a friend with unrestricted access to the [I]nternet. One tobacco retailing site, www.peacefire.org, even encourages users to go to their instructions on 'How to disable your blocking software,' by proclaiming, 'It's not a crime to be smarter than your parents.'").

[28] Lenhart, *supra* note 23, at i. Youths tend to get involved in online activities that are unavailable in their local communities. Mechthild Maczewski, *Exploring Identities Through the Internet: Youth Experiences Online*, 31 CHILD & YOUTH CARE F., 111, 117 (2002).

[29] Lenhart, *supra* note 23, at i.

[30] *Id.*

[31] *Id.*

[32] *Id.* at 36.

[33] Knowles, *supra* note 27, at 60.

tobacco products.[34] From February to November 2000 alone, the number of websites selling cigarettes increased by seventy percent.[35] Due to the evanescent nature of these ventures, it is virtually impossible to enforce youth access laws at the point of purchase.

Given the enormity of the public health crisis created by tobacco use, legislators and public health scholars agree that limiting youth access to tobacco is critical, since tobacco addiction most often begins during childhood or adolescence.[36] However, to be effective tobacco control must be comprehensive.[37] As access to tobacco products from brick-

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[34] *See, e.g.*, Kurt M. Ribisl et al., *Web Sites Selling Cigarettes: How Many Are There in the USA and What Are Their Sales Practices?*, 10 TOBACCO CONTROL 352, 355 (2001) (exploring keyword search results from various popular internet search engines to estimate the number of online cigarette vendors).

[35] A. Bryant et al., *Online Sales: Profit Without Question*, 11 TOBACCO CONTROL 226, 226 (2002). These websites are easily accessed in a matter of seconds. For example, a Google™ search using the phrase "buy cigarettes" yielded hundreds of "hits" for online cigarette vendors' websites, in only .15 second. The search, which was done on a personal computer without filtering software, yielded 2,250,000 results of various websites containing the exact phrase "buy cigarettes." Nineteen of the first twenty results included the following online retailers: www.discountcheapcigarettes.com; www.telesmokes.com; www.1001cigarettes.com; www.oklahomaoutlet.com; www.cigarettesexpress.com; www.cigarettes-online.biz; www.smoker-heaven.com; www.bigchiefcigarettes.com; www.cheap-cigarettes-shop.net; www.smokesonsale.com; www.cigline.net; www.totalsmokes.com; www.buycheapcigarettes.com; www.onlinecheapcigarettes.com; www.dirtcheapcigarettes.com.

[36] PREVENTING TOBACCO USE AMONG YOUNG PEOPLE, *supra* note 10.

[37] *See* U.S. DEP'T OF HEALTH & HUMAN SERVICES, CENTERS FOR DISEASE CONTROL & PREVENTION, PROMISING PRACTICES IN CHRONIC DISEASE PREVENTION AND CONTROL: A PUBLIC HEALTH FRAMEWORK FOR ACTION 8-2 (2003) ("[T]he comprehensive approach . . . has been the most successful in reducing tobacco use, and . . . statewide comprehensive approaches [are] particularly effective."); U.S. DEP'T OF HEALTH & HUMAN SERVICES, REDUCING TOBACCO USE: A REPORT OF THE SURGEON

and-mortar retailers becomes more difficult due to effective enforcement, adolescents will increasingly turn to Internet vendors to purchase tobacco. Studies confirm that the nature of the Internet, so immensely broad in scope and dynamic in nature,[38] allows minors to purchase cheaper, untaxed tobacco products with relative ease.[39] As cyberspace acts as a risk-free zone where minors can anonymously purchase tobacco,[40] unrestricted online tobacco sales create a major barrier to comprehensive youth tobacco control. "Left unchecked, rising Internet cigarette sales have the potential to undermine decades of progress in reducing youth and adult smoking rates achieved by raising prices."[41]

GENERAL 11 (2000) ("A comprehensive approach . . . has emerged as the guiding principle for future efforts to reduce tobacco use.").

[38] Joanna E. Cohen et al., *Tobacco Commerce on the Internet: A Threat to Comprehensive Tobacco Control*, 10 TOBACCO CONTROL 364, 366 (2001).

[39] Bryant, *supra* note 35, at 226. *See also* U.S. General Accounting Office, Report to Congressional Requestors, *Internet Cigarette Sales: Giving ATF Investigative Authority May Improve Reporting and Enforcement* (August 2002)(describing the difficulties of enforcing tax laws on Internet cigarette vendors and the evanescent nature of such vendors), *available at* www.gao.gov/new.items/d20743.pdf.

[40] Christopher Banthin et al., *Legal Approaches to Regulating Internet Tobacco Sales*, 32 J. OF LAW, MED. & ETHICS 64, 64 (2004).

[41] Kurt M. Ribisl et al., Internet Cigarette Sales, Briefing to the Congressional Task Force on Tobacco and Health, July 17, 2006, Washington, DC, *available at* http://www.sph.unc.edu/images/stories/news/Ribisl_InternetCigaretteSales.pdf . *See also* Knowles et al., *supra* note 27, at 59 (pointing out that "[I]nternet sales have the potential to erode the gains made by tobacco control") (citations omitted).

While the potential for youth online tobacco sales is present, and controlled studies demonstrate the ease with which youth can make such purchases (*see infra* notes 42-47 and accompanying text), scant data is available on the actual level of youth online tobacco purchases. *See* Campaign for Tobacco-Free Kids, *Where Do Youth Smokers Get Their Cigarettes* (2007), *available at* http://tobaccofreekids.org/research/fact

The Internet serves as a virtually effortless conduit to underage smokers' access to tobacco products largely because online tobacco vendors do not adequately prevent tobacco sales to minors.[42] A central obstacle to online youth tobacco control is vendors' nominal—if any—efforts at verifying a customer's age.[43] A 2003 study reported that online cigarette vendors sold cigarettes to minors in about 92 percent of

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sheets/pdf/0073.pdf ("The 2003 National Survey on Drug Use and Health (NSDUH) found that among 12 to 17 year olds who had smoked in the last month, more than three out of five (77%) had purchased their own cigarettes. . . . and a small portion purchased cigarettes over the Internet or through the mail (2.6% and 2.9%, respectively). . . . While there have been more recent NSDUH surveys, *no questions on youth access have been asked since 2003*." *Id.* (emphasis added).

Even if current rates are low nationally, a state with an effective enforcement program at brick-and-mortar stores may push kids to the Internet for tobacco purchases. The irony of the impact of the First Circuit's striking down of the Maine law is that Maine is left with little ability to effectively stop youth online sales, sales that are likely to increase due to the State's successful efforts at brick-and-mortar stores.

[42] *See, e.g.*, Bryant, *supra* note 35, at 226-27; *see also* Knowles, *supra* note 27, at 59 ("Unger, Rohrbach and Ribisl (9) reported that only 8 % of vendors required submission of a photo ID for proof of legal age, with most sites asking only that customers 'certify' they are over 18 years of age."). *Compare* websites listed *supra* note 35: Of those nine-teen sites, only three had meaningful age verification and purchaser identification procedures in place. Other sites, while posting that the purchaser must be at least 18 (21 in some cases), did not require any proof, but put the onus on the purchaser with language such as: "By placing an order at Cigline, you attest that you are at least 21 years of age and legally able to purchase and possess online cigarettes in your own state and community." *See* www.cigline.net.

[43] Banthin, *supra* note 40, at 64. *See also* Kurt M. Ribisl et al., *Are the Sales Practices of Internet Cigarette Vendors Good Enough to Prevent Sales to Minors?*, 92 AM. J. PUB. HEALTH 940, 940 (June 2002) ("Most Internet cigarette vendors use inadequate procedures for age verification. Youths who misrepresent their age and obtain a money order could potentially purchase cigarettes on-line without difficulty.").

attempted purchases.[44] In each successful purchase, the consumer's age was never verified upon delivery;[45] rather, most packages were left at the door.[46] In another study, over 70 percent of online tobacco retailers who received money orders from minors sent cigarettes to the underaged customers without any age verification.[47]

No simple solution exists to resolve the unique challenges presented by online tobacco commerce.[48] Public health and tobacco control scholars suggest that proactive solutions be made to address online threats to comprehensive control. Recognizing the Internet "gap" in youth access enforcement and desiring to close that easy avenue to cigarette purchases, Maine enacted legislation regulating the delivery of tobacco via the Internet. This law is a critical component of Maine's comprehensive plan to curtail youth access to tobacco products, and thereby reduce youth smoking prevalence.

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[44] Kurt M. Ribisl et al., *Brief Report: Internet Sales of Cigarettes to Minors*, 290 J. AM. MED. 1356, 1357 (2003).

[45] *Id.* at 1358. In a 2004 study, 82 of 89 young participants reported that they pretended to be older while online, and some said they did so "to evade online age restrictions." Gross, *supra* note 24, at 643.

[46] Ribisl, *supra* note 44, at 1359.

[47] Bryant, *supra* note 35, at 227.

[48] Although state enforcement actions against individual websites or vendors have been used in some instances, such actions have a narrow and fleeting impact. The website operator can easily establish a new web address and begin selling cigarettes from that site almost immediately after a state has taken action. State enforcement actions also have modest impact because the Internet tobacco sellers are often based overseas, presenting serious hurdles to service of process and jurisdiction. Hence, a state desiring to have a comprehensive and effective impact on Internet tobacco sales must focus, as Maine has, on the delivery process. *See generally* GAO Report, *supra* note 39.

III. THE FIRST CIRCUIT'S DECISION UNREASONABLY PREVENTS MAINE AND OTHER STATES FROM COMPREHENSIVELY CONTROLLING YOUTH ACCESS TO TOBACCO

The First Circuit improperly ruled that the FAAAA preempts provisions of the Maine tobacco delivery law requiring retailers to use carriers that monitor the point of delivery and imputing knowledge to those carriers that deliver contraband tobacco despite identifiable markings. The decision severely limits Maine's ability to regulate Internet or mail-order tobacco sales as part of the State's comprehensive plan to reduce youth smoking. This Court should reverse the First Circuit, reinstating state police power as it is traditionally exercised in this area.

A. Maine's Tobacco Delivery Law Was Properly Enacted Pursuant to the State's Police Powers and is a Necessary Response to Congress's Call to Reduce Youth Access to Tobacco

The states' authority to enact and enforce laws designed to prevent minors' access to tobacco products sold via the Internet is as broad as the power to prevent such sales at brick-and-mortar stores. The states' obligation to regulate Internet tobacco sales is no less than the obligation to regulate brick-and-mortar sales. Traditional police powers include such regulation and federal law suggests such an obligation. The First Circuit's decision virtually obliterates the states' police power in this area as it relates to Internet sales and clashes with important federal public health laws that impose on states the obligation to prevent youth access to tobacco.

Congress has directly recognized and encouraged the states' role in enforcing youth access tobacco laws. Pursuant to the 1992 Synar Amendment, Congress directly mandates state regulation of youth access to tobacco by conditioning federal funding on state enactment and enforcement of laws banning

the sale of tobacco to minors.[49] Congress has not yet taken action to restrict Internet tobacco sales, but has, so far, left that to the states. [50]

The judiciary has also acknowledged that states play a role in preventing youth access to tobacco. In *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 552 (2001), this Court recognized "established congressional policy that supports" a state role in the regulation of tobacco sales. Similarly, the Fourth Circuit emphasized the "clear congressional intent that States exercise their traditional police powers and take a primary role in attacking the problem of youth access to tobacco products." *Brown & Williamson Tobacco Corp. v. Food and Drug Admin.*, 153 F.3d 155, 175 (4th Cir. 1998), *aff'd*, 529 U.S. 120 (2000).

Pursuant to its police powers and to help it comply with the Synar Amendment, Maine properly enacted a public health law "to Regulate the Sale of Tobacco Products and to Prevent the Sale of Cigarettes to Minors."[51] Maine's tobacco delivery

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[49] 42 U.S.C. § 300x-26(b)(1) (2000) ("Synar Amendment") (States will enforce their tobacco laws "in a manner that can be reasonably expected to reduce the extent to which tobacco products are available to individuals under the age of 18.") The Synar Amendment was originally enacted in 1992 as Section 1926 of Title XIX of the Federal Public Health Service Act. *See also* Joseph R. DiFranza and G.F. Dussault, *The Federal Initiative to Halt the Sale of Tobacco to Children—the Synar Amendment, 1992-2000: Lessons Learned*, 14 TOBACCO CONTROL 93, 97 (2005) (noting that Maine is one of the few states that has endeavored to promote maximum public health benefits by successful enforcement of laws banning the sale of tobacco to minors).

[50] *See, e.g.*, H.R. 2824 (2004), the "Internet Tobacco Sales Enforcement Act" and S. 1177 (2004), the "Prevent All Cigarette Trafficking Act" (PACT), both of which were failed attempts at federal legislation regulating Internet sales and sellers of tobacco.

[51] L.D. 1236 (121st Maine Leg.) (codified at ME. REV. STAT. ANN. tit. 22 §§ 1551, 1555-C, & 1555-D (West 2004)).

law does so by imposing, among other things, [52] three requirements. First, the law compels licensed retailers to choose a delivery service or carrier that provides age and identity verification and signature services at the point of delivery
to consumers in Maine.[53] Second, the Act mandates that tobacco retailers "clearly mark the outside of the packages of tobacco products to be shipped to indicate that the contents are tobacco products and to show the name and State of Maine tobacco license number of the tobacco retailer."[54] Third, the law imposes penalties on any person who "knowingly transport[s] . . . a tobacco product purchased from a person who is not licensed [in Maine] as a tobacco retailer."[55] A carrier is "deemed to know" that a given package contains a tobacco product if the package contains markings in accordance with § 1555-C(3)(b) or if the package was received

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[52] Maine's law also consists of several additional provisions designed to comprehensively curtail youth tobacco access. For one, all retailers must be licensed and are subject to several restrictions on the acceptance of an order for delivery within the State of Maine. ME. REV. STAT. ANN. tit. 22 §§ 1555-C(1)-(2); *see also id.* at § 1555-C(2)(B) (requiring retailers to receive payment by credit card or check for sales linked to online advertisements). Retailers must also report sales to the Maine Bureau of Revenue Services. *Id.* at § 1555-C(4). Further, Maine's legislation prohibits the use of another person's name in ordering tobacco products. *Id.* § 1555-C(5).

[53] ME. REV. STAT. ANN. tit. 22 §§ 1555-C(3)(C)(1)-(3). The statute requires the package addressee to be the purchaser, who must be over age eighteen and personally sign for the package upon delivery. A valid photo ID is required for any purchaser appearing to be under age twenty-seven.

[54] *Id.* at § 1555-C(3)(B). This provision is not a contested issue in the case at hand, but bears on the imputed knowledge provision in § 1555-D.

[55] *Id.* at § 1555-D.

from a known unlicensed retailer as identified by the Attorney General.[56]

At least ten other states have passed similar legislation aimed at preventing youth access to tobacco online.[57] Like the Maine law, tobacco control delivery laws in other jurisdictions require retailers to use a carrier with age and signature verification upon delivery of tobacco products. For example, the State of Virginia requires retailers to use a delivery service that provides signature acceptance of delivery and proof of age through "a valid, government-issued identification" at delivery time.[58] Similarly, the State of Utah allows mail-order tobacco sales if the retailer requires a "postal authority or other common carrier to," among other things, obtain a signature and verify the age of the person taking the delivery.[59] Many other states regulate youth access to tobacco via Internet delivery sales either by banning such

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[56] *Id.* Maine's Office of the Attorney General maintains lists of licensed retailers and known unlicensed retailers, which are made available to carriers. *Id.* § 1555-D-1. *See also* New Hampshire Motor Transport Ass'n v. Rowe, 377 F. Supp. 197, 211 & n.60 (D. Me. 2005).

[57] *See, e.g.*, ARIZ. REV. STAT. ANN. § 42-3225(A)(2) (West 2004); DEL. CODE. ANN. tit. 30, § 5365(a)(2) (West 2004); IND. CODE ANN. § 24-3-5-5(a) (West 2004); LA. REV. STAT. ANN. § 47:874(A)(2) (West 2004); OKLA. STAT. ANN. tit. 68, § 317.4(A)(2) (West 2004); OR. REV. STAT. ANN. § 323.718(1)(b) (West 2004); TEX. HEALTH & SAFETY CODE ANN. § 161.455(a)(2) (Vernon 2004); UTAH CODE ANN. § 76-10-105.1(3)(a) (West 2004); VA. CODE ANN. § 18.2-246.10(2) (West 2004); W. VA. CODE ANN. § 16-9E-4(a)(2) (West 2004).

[58] VA. CODE ANN. § 18.2-246.10(2) (West 2004).

[59] UTAH CODE ANN. § 76-10-105.1 (West 2004).

sales[60] or by regulating retailers or affecting carriers in some fashion.[61]

B. Maine's Tobacco Delivery Law Is Not Preempted By The FAAAA And Therefore The First Circuit's Exceedingly Broad Interpretation Of FAAAA Preemption Should Be Reversed

Enacted in 1994, the FAAAA prohibits states from regulating the prices, routes, or services of air or motor carriers that transport property.[62] The FAAAA is not a tobacco control measure and was not intended to limit states' powers to police minors' access to tobacco. Rather, the FAAAA is specifically intended to prevent states from engaging in economic regulation that would eliminate non-uniform air and motor carrier operations.[63]

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[60] *See, e.g.*, N.Y. PUB. HEALTH LAW § 1399-ll (McKinney 2004); MD. CODE ANN., BUS. REG. § 16-223 (2004).

[61] *See, e.g.*, ALASKA STAT. § 43.50.105 (Michie 2004); CAL. BUS. & PROF. CODE § 22963 (West 2004); CONN. GEN. STAT. ANN. § 12-285c (West 2004); IDAHO CODE ANN. §§ 39-5701 to -5718; 720 ILL. COMP. STAT. ANN. §§ 678/5, -/10, -/99 (West 2004); KAN. STAT. ANN. § 79-3333 (2004); MICH. COMP. LAWS ANN. § 205.431 (West 2004); MO. ANN. STAT. §§ 407.925 to .932 (West 2004); NEV. REV. STAT. ANN. § 202.24935 (West 2004); R.I. GEN. LAWS §§ 11-9-13.11 to -13.19 (2004); TENN. CODE ANN. § 39-17-1504(d) (West 2004); WASH. REV. CODE ANN. §§ 70.155.010, -.105, -.110 (West 2004).

[62] 49 U.S.C. § 14501(c)(1) (2000) ("[A] State . . . may not enact or enforce a law . . . related to a price, route, service of any motor carrier . . . with respect to the transportation of property."); 49 U.S.C. § 41713(b)(4)(A) (2000) ("[A] State may not enact or enforce a law . . . related to a price, route or service of an air carrier or carrier affiliated with a direct air carrier through common controlling ownership when such carrier is transporting property by aircraft or by motor vehicle. . . .").

[63] H.R. Conf. Rep. No. 103-677, at 85-88 (1994), *reprinted in* 1994 U.S.C.C.A.N. 1715, 1758-60.

Maine's tobacco delivery law is a public health measure aimed at regulating online tobacco retailers and preventing the illegal delivery of tobacco products to minors by anyone—including carriers. As such, the tobacco delivery law does not significantly affect carrier services in any way sufficient to trigger FAAAA preemption. The FAAAA trumps only state laws that impose on carriers economic regulations such as rate and tariff measures; contrary to the First Circuit's conclusion, the FAAAA was not intended to reach essential public health laws that are clearly within the province of a state's police powers.

The First Circuit acknowledged that the legislative history of the FAAAA reveals Congress's intent to preempt only state economic regulation,[64] and further noted the limited preemptive interpretation this Court applied in its only case involving the FAAAA.[65] Nevertheless, the First Circuit sidelined all evidence of Congress's preemptive intent, emphasizing instead that "legislative history cannot trump the statute's [plain] text."[66] Relying on other federal legislation and case

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[64] The First Circuit noted that "there is some support in the legislative history . . . that the FAAAA preempts only state economic regulation" and cited to support in the Conference Committee Report for the Act. New Hampshire Motor Transport Ass'n v. Rowe, 448 F.3d 66, 77 (1st Cir. 2006).

[65] *See Rowe*, 448 F.3d at 77 (citing Columbus v. Ours Garage & Wrecker Serv., 536 U.S. 424, 440 (2002)).

[66] *Rowe*, 448 F.3d at 77. The First Circuit noted that "[i]n every preemption case, 'the purpose of Congress is the ultimate touchstone.'" *Id.* at 74 (citing Medtronic, Inc. v. Lohr, 518 U.S. 470, 485 (1996)). The First Circuit further remarked that "[t]he primary focus is on the 'plain wording' of the statute because the text 'contains the best evidence of Congress' pre-emptive intent.' " *Rowe*, 448 F.3d at 74 (citing Sprietsma v. Mercury Marine, 537 U.S. 51, 62 (2002)). The court acknowledged the relevance of " 'the structure and purpose of the statute as a whole as revealed . . . through the reviewing court's reasoned understanding of the way in which Congress intended the statute and its surrounding regulatory

law, the First Circuit interpreted the FAAAA as "deliberately expansive" and broadly preemptive in purpose,[67] holding that

> the FAAAA was not intended to preempt only a narrow class of economic regulations while excluding the many laws enacted by the states under their police powers. If Congress had such a limited purpose in mind, it likely would have employed narrower language in fashioning the FAAAA preemption provisions.[68]

Furthermore, the First Circuit erroneously applied this Court's requirement that to find a state law is "related to" carrier services, the law must have a "connection or reference to" carrier services[69] or a "forbidden significant effect" on those services.[70] The First Circuit dismissively read "significant" out of the standard and substituted a "logical" effect.[71] This needlessly broadens the FAAAA's preemptive effect and ignores this Court's statement in *Morales* that there are instances of state regulation "relating to" prices, routes, or

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scheme to affect business, consumers and the law.'" *Rowe*, 448 F.3d at 74 (citing *Medtronic*, 518 U.S. at 486).

[67] *Rowe*, 448 F.3d at 75-78.

[68] *Id.* at 75.

[69] Morales v. Trans World Airlines, Inc., 504 U.S. 374, 384 (1992).

[70] *Id.* at 388 (finding that "it is clear as an economic matter that state restrictions on fare advertising have the forbidden significant effect upon fares").

[71] "We agree with the district court that there is no such quantification requirement [to measure forbidden significant effect]. The cases in this area have looked to the *logical* effect that a particular scheme has on the delivery of services or the setting of rates and have not required the presentation of empirical evidence." *Rowe*, 448 F.3d at 82, n. 14 (emphasis added). The First Circuit further emasculated this Court's standard by stating that Maine's age verification procedures "all *could* affect timely deliveries." *Id.* at 79 (emphasis added).

services that would not be preempted.[72] This Court recognized the limits of preemption in *Morales*, stating that its ruling "does not give the airlines *carte blanche* to lie and deceive consumers . . . ." [73] Nor should any transporter of contraband tobacco products have *carte blanche* to disregard the contents of its cargo.

C. The Decision Below Prevents Maine From Regulating The Critical Point Of Delivery Of Tobacco To Minors, Thus Impairing Maine From Fulfilling The Goal Of The Synar Amendment To Reduce Minors' Access To Tobacco

The First Circuit's conclusion that Congress intended the FAAAA to preempt state public health laws like Maine's tobacco delivery provisions[74] is also incompatible with the goals set forth in the Synar Amendment.[75] The Synar Amendment requires that states enforce laws prohibiting youth tobacco sales. Although in 1992 such sales took place almost exclusively in brick-and-mortar stores and the enforcement mechanism focused on brick-and-mortar stores, nothing in the Synar Amendment limits the states' overall obligation to such sales. Yet the First Circuit's decision

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[72] "Nor need we address whether state regulation of the nonprice aspects of fare advertising (e.g. state laws preventing obscene depictions) would similarly 'relat[e] to' rates; the connection would obviously be far more tenuous." *Morales*, 504 U.S. at 390. While the case at hand involves carrier services rather than prices, the connection is at least equally as tenuous.

[73] *Id.* at 390-91.

[74] *See supra* note 67 and accompanying text; *see also Rowe*, 448 F.3d at 78 ("We therefore conclude that the FAAAA preempts state police-power enactments to the extent that they are 'related to' a carrier's prices, routes, or services.").

[75] *See supra* notes 18 and 49 and accompanying text.

substantially impairs the ability of the states to limit sales to those covered by sound, reasonable restrictions on the retail sale of tobacco products when the sale is consummated over the Internet and delivered by a common carrier. With no detail or explanation, the court blithely states that the Synar Amendment and a broad interpretation of the FAAAA's preemptive force "can exist harmoniously because states may pass laws to curb underage smoking without passing laws 'related to' carrier prices, routes, or services."[76] Because physical delivery is a crucial part of the illegal sale,[77] a regulation that does not impact the carriers will be far less effective. And the First Circuit's overbroad interpretation of the FAAAA preemption clause makes such regulation far more difficult.[78]

States must regulate the point of physical delivery of tobacco to effectively combat youth access to tobacco and

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[76] *Rowe*, 448 F.3d. at 78, n.12.

[77] *See* ME. REV. STAT. ANN. tit. 22 § 1555-B (West 2004) ("A person may not sell, furnish, give away or offer to sell, furnish or give away a tobacco product to any person under 18 years of age."). *See also* Ribisl, *supra* note 43, at 940 (very few "Internet cigarette vendors stated that they required photographic age identification at the point of delivery, the prevailing standard at [brick-and-mortar] retail outlets").

[78] Although not emphasized by the First Circuit, states also desire to regulate Internet tobacco sales to prevent the tax evasion that such sales inherently create. Tax evasion not only costs a state financially, such evasion undercuts the public health impact of reduced consumption, especially by minors, that accompanies higher cigarette prices. The federal government has attempted to assist states in this effort through the Jenkins Act, 15 U.S.C. §§ 375-378, which requires tobacco sellers who ship cigarettes across state lines to report sales to the appropriate state tax authority. It is fair to say that the federal government has invested no resources in enforcement of the Jenkins Act. *See* GAO Report, *supra* note 39. As the GAO Report explains, state governments have been active in indirect enforcement of the Jenkins Act, at least attempting to have an impact on Internet and mail order tobacco sales, while the federal government has taken no action.

receive federal funding conditioned under the Synar Amendment. Congress did not intend an expansive preemption clause when adopting the FAAAA; the focus was and remains on economic impact on carriers. Indeed, the district court acknowledged that if Congress were to be presented with the issue today, it would not have intended FAAAA preemption of Maine's tobacco delivery law.[79] Nevertheless, that court and the First Circuit put on blinders, performed strict construction that denies logic, history, and this Court's previous decision on FAAAA preemption, and found Maine's tobacco delivery law preempted.

Any regulation of the point of delivery of tobacco is naturally going to have *some* effect on carriers who deliver the tobacco products. Under the First Circuit's exceedingly broad interpretation of "relating to" in the FAAAA,[80] every hypothetical regulation policing the point of delivery—including an outright ban on Internet sales—could have a "forbidden significant effect" on carrier services[81] and there-

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[79] The district court opined:

> Given the deadly health consequences, there are no persuasive arguments for allowing minors to have tobacco products. Thus, it is hard to believe that, if Congress were confronted now with the specific question whether Maine should be able to take steps to protect the health of its children, Congress would vote to prohibit what Maine is trying to do. But the federal legislation that I must interpret comes from a push to deregulate airlines and motor carriers generally, without regard for the topic or goal of the preempted state regulation . . . .

New Hampshire Motor Transport Ass'n v. Rowe, 377 F. Supp. 2d 197, 206 (D. Me. 2005).

[80] *See Rowe*, 448 F.3d at 75, 78-79 (noting that the FAAAA's use of the phrase "relating to" intended the statute to have a broad preemptive purpose).

[81] *Id.* at 78-79.

fore may be rendered unenforceable through federal preemption.

Maine's inability to regulate the point in time when tobacco sold online is placed in the hands of a minor undermines the State's attempt to achieve comprehensive youth tobacco control, and threatens to nullify the progress Maine has made to date.[82] Therefore, the First Circuit's overly broad interpretation of FAAAA preemption directly conflicts with Congress's goal that states take effective action to reduce youth access to tobacco.

In rejecting the Attorney General's argument that laws enacted pursuant to a state's police power to protect the health and welfare of its citizens are excepted from the FAAAA's preemptive force, the First Circuit reasoned that "an overly broad interpretation of the FAAAA exceptions 'would swallow the rule of preemption.'"[83] Instead, the First Circuit's overly broad interpretation of FAAAA's preemption derogates the Synar Amendment, through which Congress "inten[ded] that states take the lead in addressing the underage smoking problem."[84]

STATEMENT OF INTEREST OF *AMICUS CURIAE*

The Tobacco Control Legal Consortium ("TCLC") is a national network of legal centers providing technical assis-

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[82] Maine has been praised by the American Cancer Society, the American Lung Association and the Campaign for Tobacco-Free Kids for the State's effective use of tobacco control funds, particularly as related to youth access to tobacco and youth smoking. *See* Campaign for Tobacco-Free Kids, *Broken Promise to Our Children: The 1998 State Tobacco Settlement Seven Years Later* (2005), *available at* http://tobaccofreekids.org/reports/settlements/2006/fullreport.pdf.

[83] *Rowe*, 448 F.3d at 76 (citing United Parcel Serv., Inc. v. Flores-Galarza, 385 F.3d 9, 14 (1st Cir. 2004)).

[84] *Id.* at 78 n.12.

tance to public officials, health professionals, and advocates in addressing legal issues related to tobacco and health, and supporting public policies that will reduce the harm caused by tobacco use in the United States. TCLC grew out of collaboration among specialized legal resource centers serving six states and is supported by national advocacy organizations, voluntary health organizations, and others.[85] In addition, TCLC prepares legal briefs as *amicus curiae* in cases in which its experience and expertise may assist courts in resolving tobacco-related legal issues of national significance. TCLC has submitted *amicus* briefs in recent cases before the U.S. Supreme Court; the Supreme Courts of California, Delaware, Florida, Kentucky, Montana, and Washington; and the U.S. District Court for the District of Columbia.

Amicus Campaign for Tobacco-Free Kids, a nonprofit corporation based in Washington, D.C., works to educate the public and policymakers about effective public and private sector policies to prevent and reduce tobacco use and its harms, and to advocate for the adoption of such policies, with a special focus on preventing and reducing tobacco use among youth. The Campaign for Tobacco-Free Kids has over 100 member organizations, including health, civic, corporate, youth, and religious groups dedicated to reducing tobacco use

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[85] TCLC's coordinating office is located at the Tobacco Law Center of the William Mitchell College of Law in St. Paul, Minnesota. Other affiliated legal centers include the Technical Assistance Legal Center (TALC) at the Public Health Institute of California, in Oakland, California; the Legal Resource Center for Tobacco Regulation, Litigation & Advocacy (TRC) at the University of Maryland School of Law in Baltimore, Maryland; the Tobacco Control Resource Center (TCRC) at Northeastern University School of Law in Boston, Massachusetts; the Smoke-Free Environments Law Project (SFELP) at the Center for Social Gerontology in Ann Arbor, Michigan; the Tobacco Control Policy and Legal Resource Center at New Jersey GASP in Summit, New Jersey; and the Tobacco Public Policy Center at Capital University Law School in Columbus, Ohio.

and its harms, especially among children. Among other activities, the Campaign has done education and advocacy work relating to Internet and mail-order sales of tobacco products to kids articulating why such sales are harmful to state efforts to collect applicable taxes; keep tobacco prices at high rates to discourage smoking, especially in youth; and diminish the ready access to tobacco products for all consumers.

Amicus American Lung Association ("ALA") is one of the nation's oldest voluntary health organizations, with over 300,000 volunteers and affiliates in all fifty states, the District of Columbia and Puerto Rico. Since cigarette smoking is a major cause of chronic obstructive lung disease, ALA has long been active in research, education, and public policy advocacy on the adverse health effects of tobacco products. ALA has advocated for the regulation of tobacco products for more than two decades. *Amicus* American Lung Association of Maine[86] ("ALAME") is one of the state's oldest voluntary health organizations. From tuberculosis to smoking to unhealthy air, ALAME has fought the most significant threats to lung health for nearly 100 years. Since cigarette smoking remains the major cause of chronic obstructive lung disease, the ALAME has long been active in research, education and public policy efforts to prevent smoking, help those who want to quit and protect everyone from the health hazard of secondhand smoke. ALAME has advocated for tobacco product regulation for more than three decades.

Amicus American Cancer Society, Inc. ("ACS") has over three million volunteers nationwide, including 50,000 physicians. The organization's mission is to eliminate cancer as a major health problem by preventing cancer, saving lives, and diminishing suffering from cancer, through research, educa-

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[86] Legally, the American Lung Association of Maine is part of the American Lung Association of New England, a non-profit corporation.

tion, advocacy, and service. The organization was founded in 1913, and since that time has conducted groundbreaking research in identifying the use of tobacco products as a major cause of cancer, and educating the public about its deadly effects. ACS strongly advocates for tobacco regulation at all levels of government, including trying to ensure that children do not have access to this lethal product.

Amicus American Heart Association ("AHA") is a non-profit, voluntary health organization with nearly 2,000 community organizations in the 50 states, the District of Columbia and Puerto Rico. AHA's mission is building healthier lives, free of cardiovascular diseases and stroke, including reducing tobacco use. AHA has long been active before Congress and regulatory agencies on tobacco and health-related matters and has petitioned the FDA on several occasions seeking regulation of cigarettes and other tobacco products under the Food, Drug, and Cosmetic Act.

Amicus American Legacy Foundation, created as a result of the 1998 Master Settlement Agreement between 46 states and the tobacco industry, is dedicated to building a world where young people reject tobacco and anyone can quit. The Foundation is a national leader in youth tobacco prevention with its proven-effective and award-winning truth® mass media campaign targeted to those twelve to seventeen year olds most likely to initiate smoking.

Amicus Americans for Nonsmokers' Rights ("ANR") is a national non-profit tobacco control advocacy organization based in Berkeley, California. Since its formation in 1976, ANR has been dedicated to protecting nonsmokers' rights to breathe smoke-free air in enclosed public places and workplaces and to preventing tobacco addiction among youth. ANR represents a national constituency of over 8,000 individuals and organizations concerned about the health risks that tobacco products pose to the health and safety of smokers

and nonsmokers alike and committed to reducing and preventing tobacco use.

Amicus American Medical Association ("AMA"), an Illinois non-profit corporation founded in 1847, is an association of approximately 240,000 physicians, residents, and medical students. Its members practice in every state and in all fields of medical specialization, and it is the largest medical society in the United States. Its objects are to promote the science and art of medicine and the betterment of public health. The AMA has developed expertise in the pharmacology of nicotine, the toxic effects of cigarette smoke, and the societal implications of tobacco usage. For many years, the AMA has been one of the leading anti-smoking organizations in the United States.

Amicus Maine Medical Association ("MMA") is a professional organization founded in 1853 that represents more than 2700 Maine physicians and whose purpose is "to unite and support the physicians of Maine in promoting the health of Maine's citizens, protecting and promoting the quality of medicine, and supporting the physicians' function as advocates for their patients." The MMA is active in representing the interests of Maine physicians and patients before the Maine legislature and Executive Branch agencies. Through its Public Health Committee and its role as a founding member of the Maine Coalition on Smoking or Health more than 25 years ago, the MMA has been involved in tobacco control advocacy in Maine for many years. The MMA has a particular interest in this litigation because of its advocacy role in the legislation that is subject to dispute in this matter.

CONCLUSION

For the foregoing reasons, this Court should reverse the First Circuit's decision, find Maine's law enforceable, and return to states the power to comprehensively curtail youth access to tobacco.

Respectfully submitted,

KATHLEEN HOKE DACHILLE *
LEGAL RESOURCE CENTER FOR
TOBACCO REGULATION,
LITIGATION & ADVOCACY
500 W. Baltimore Street
Baltimore, MD 21201
(410) 706-1294

* Counsel of Record

Counsel for Amicus Curiae

8/23/07

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No. 06-457

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SUPREME COURT, U.S.

AMER RECORDS AND BRIEFS

In The
Supreme Court of the United States

G. STEVEN ROWE, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF THE STATE OF MAINE,

Petitioner,

v.

NEW HAMPSHIRE MOTOR TRANSPORT ASSOCIATION, MASSACHUSETTS MOTOR TRANSPORTATION ASSOCIATION, INC., and VERMONT TRUCK & BUS ASSOCIATION, INC.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

JOINT APPENDIX

BETH S. BRINKMANN
(Counsel of Record)
MORRISON & FOERSTER, LLP
2000 Pennsylvania Avenue, NW
Washington, DC 20006-1888
Tel: (202) 887-1544
Fax: (202) 887-0763

PAUL T. FRIEDMAN
RUTH N. BORENSTEIN
LAWRENCE R. KATZEN
MORRISON & FOERSTER, LLP
425 Market Street
San Francisco, CA 94105-2482
Tel: (415) 268-7000
Fax: (415) 268-7522

Counsel for Respondents

G. STEVEN ROWE
Attorney General
PAUL STERN
Deputy Attorney General
(Counsel of Record)
MELISSA REYNOLDS O'DEA
CHRISTOPHER C. TAUB
PETER B. LAFOND
Assistant Attorneys General
OFFICE OF THE ATTORNEY GENERAL
6 State House Station
Augusta, ME 04333-0006
Tel: (207) 626-8568
Fax: (207) 287-3145

Counsel for Petitioner

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11-25-2003	Response to Statement of Fact and Statement of Additional Material Facts filed by ME Attorney General
12-16-2003	Reply to Response to Motion for Summary Judgment filed by Massachusetts Motor Transportation Association, Inc., New Hampshire Motor Transport Association, Vermont Truck and Bus Association, Inc.

12-16-2003	Reply to Response to Statement of Fact Filed by Massachusetts Motor Transportation Association, Inc., New Hampshire Motor Transport Association, Vermont Truck and Bus Association, Inc.
01-08-2004	Minute Entry for Proceedings held before Judge D. Brock Hornby, Conference of Counsel Held
01-15-2004	Transcript of Proceedings: Conference held on January 8, 2004 before Judge D. Brock Hornby/Modified on 1-27-2004 to remove security restriction
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11-17-2004	Minute Entry for Proceedings Held before Judge D. Brock Hornby: Motion Hearing Held on Motions for Summary Judgment "As Applied" (Redacted) filed by New Hampshire Motor Transport Association, Massachusetts Motor Transportation Association, Inc., Vermont Truck and Bus Association, Inc. and by ME Attorney General
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Docket No.: 05-2136

07-28-2005	Civil Case Docketed. Notice of Appeal filed by Appellant G. Steven Rowe
08-11-2005	Docketing Statement filed by Appellant G. Steven Rowe
10-04-2005	Appellees-Plaintiffs' Motion to Seal Filed by Appellees New Hampshire Motor Transport Association, Massachusetts Motor Transportation Association, Inc., Vermont Truck and Bus Association, Inc.
10-04-2005	Unredacted Appellant Brief and Appendix (Vol. II) (Provisionally Filed Under Seal) filed by Paul Stern for Appellant G. Steven Rowe
10-04-2005	Redacted Brief filed by Appellant G. Steven Rowe
10-04-2005	Unsealed Appendix (Vol. I) filed by Appellant G. Steven Rowe
10-05-2005	Order entered by Senior Judge Levin H. Campbell. The Motion filed by Plaintiffs-Appellees to Seal Material filed and Maintained Under Seal in the District Court and to Seal Unredacted Appellate Filings that Disclose the Sealed Material is Granted. The Parties will File Publicly Available Redacted Versions of all Briefs on Appeal
10-05-2005	Unredacted Brief (Filed Under Seal) filed by Appellant G. Steven Rowe
10-05-2005	Appendix (Filed Under Seal) Filed by Appellant G. Steven Rowe

10-11-2005	Amicus Brief filed by States of New York, Alaska, California, Hawaii, Idaho, Illinois, Iowa, Louisiana, Maryland, Massachusetts, Missouri, Montana, Nevada, North Carolina, Ohio, Oklahoma, Oregon, Rhode Island, South Carolina, South Dakota, Tennessee, Utah, Vermont, Washington, West Virginia and Wisconsin in Support of Appellant.
12-19-2005	Brief (Filed Under Seal) filed by Appellees New Hampshire Motor Transport Association, Massachusetts Motor Transportation Association, Inc., Vermont Truck and Bus Association, Inc.
12-19-2005	Redacted Version of Brief filed by Appellees New Hampshire Motor Transport Association, Massachusetts Motor Transportation Association, Inc., Vermont Truck and Bus Association Inc.
12-27-2005	Brief filed by Amicus Curiae American Trucking Associations, Inc. and Amicus Curiae Chamber of Commerce of the United States in Support of Appellees New Hampshire Motor Transport Association, et al.
01-04-2006	Brief Filed by Amicus Curiae Federal Express Corporation in Support of Appellees New Hampshire Motor Transport Association, Massachusetts Motor Transportation Association, Inc., Vermont Truck and Bus Association Inc. In Support of Affirmance.
01-19-2006	Unredacted Reply brief (Filed Under Seal) Filed by Appellant G. Steven Rowe.
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02-02-2006	Sur-Reply Brief Filed by Appellees New Hampshire Motor Transport Association, Massachusetts Motor Transportation Association, Inc., Vermont Truck and Bus Association Inc.
02-10-2006	Case Argued 02-10-2006. Boudin, Ch. J., Stahl, Howard, JJ. Paul Stern for Appellant G. Steven Rowe. Ruth N. Borenstein for Appellees
05-19-2006	Opinion Filed. Chief Judge Michael Boudin, Senior Judge Norman H. Stahl, and Judge Jeffrey R. Howard, Signed Judge Jeffrey R. Howard, Authoring Judge.
05-19-2006	Judgment entered by Chief Judge Michael Boudin, Senior Judge Norman H. Stahl, and Judge Jeffrey R. Howard. This cause came on to be heard on Appeal from the United States District Court for the District of Maine and was argued by counsel. Upon consideration whereof, it is now here Ordered, Adjudged and Decreed as follows: The District Court's Judgment as it pertains to 22 M.R.S.A. § 1555-C(3)(C) and the second part of 22 M.R.S.A. § 1555-D is affirmed, but the judgment as it pertains to the first part of § 1555-D is reversed. The case is remanded to the District Court with instructions to amend the judgment consistent with the opinion issued this day. No costs are awarded
06-09-2006	Mandate issued

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MAINE

NEW HAMPSHIRE MOTOR TRANSPORT ASSOCIATION, MASSACHUSETTS MOTOR TRANSPORTATION ASSOCIATION, INC., AND VERMONT TRUCK & BUS ASSOCIATION, INC., Plaintiffs, -v- G. STEVEN ROWE, in his official capacity as Attorney General of the State of Maine, Defendant.	Case No.

COMPLAINT
(INJUNCTIVE RELIEF SOUGHT)

NOW COME plaintiffs, the New Hampshire Motor Transport Association, the Massachusetts Motor Transportation Association, Inc., and the Vermont Truck & Bus Association, Inc., by and through their attorneys, Morrison & Foerster LLP and Jensen Baird Gardner & Henry, and for its Complaint state as follows:

1. This is an action, pursuant to 28 U.S.C. §§ 2201, 2202 and the Supremacy Clause of the United States Constitution, for declaratory and injunctive relief, seeking compliance by G. Steven Rowe, in his official capacity as Attorney General of the State of Maine, with 49 U.S.C. §§ 14501(c)(1) and 41713(b)(4), also known as the Federal

Aviation Administration Authorization Act of 1994 (the "FAAAA").

2. Specifically, plaintiffs seek:

(a) a declaration that 22 M.R.S.A. §§ 1555-C(3)(A) and (C) are preempted by federal law under the FAAAA and the Supremacy Clause – because those provisions purport to regulate which "Delivery Services" can be utilized for shipping a Delivery Sale of Tobacco Products to a person in Maine, and what data Delivery Services must collect from shippers of such packages;

(b) a declaration that 22 M.R.S.A. § 1555-D is preempted by federal law under the FAAAA and the Supremacy Clause as applied to motor carriers and air/ground intermodal carriers – because that provision purports to regulate from whom and to whom such carriers may make a delivery of Tobacco Products in Maine; and

(c) a permanent injunction enjoining defendant from enforcing 22 M.R.S.A. §§ 1555-C(3)(A) and (C) altogether, and from enforcing 22 M.R.S.A. § 1555-D as against motor carriers and air/ground intermodal carriers.[1]

[1] Hereinafter, Me. Rev. Stat. Ann. tit. 22, § 1555-D and Me. Rev. Stat. Ann. tit. 22, §§ 1555-C(3)(A) and (C) are referred to collectively as the "Challenged Provisions." The text of, and all citations to, the Challenged Provisions can be found in the Act of June 9, 2003, ch. 444, 2003 Me. Laws 444 (regulating delivery and sales of tobacco products and preventing sales of tobacco products to minors).

JURISDICTION AND VENUE

3. This action arises under the Constitution and laws of the United States, including the Supremacy Clause of the Constitution, U.S. Const. art. VI, cl. 2; and the FAAAA, 49 U.S.C. §§ 14501(c)(1), 41713(b)(4). Accordingly, this Court has jurisdiction pursuant to 28 U.S.C. § 1331 (federal question), and 28 U.S.C. § 1337(a) (Act of Congress regulating commerce).

4. This is a proceeding for a declaratory judgment and injunctive relief under 28 U.S.C. §§ 2201, 2202 and the Supremacy Clause. This action presents an actual controversy within the Court's jurisdiction.

5. Venue is proper in this district pursuant to 28 U.S.C. § 1391(b)(1) and (2), because the claims asserted in this Complaint are based on events occurring in this district, and defendant maintains offices and performs official duties within this district.

PARTIES TO THIS ACTION

6. Plaintiffs are the New Hampshire Motor Transport Association, the Massachusetts Motor Transportation Association, and the Vermont Truck & Bus Association, Inc. (collectively the "Carrier Associations").

7. The New Hampshire Motor Transport Association ("NHMTA") is a non-profit trade association that was founded in the 1930s. It has more than 350 members engaged in the commercial delivery of packages containing property. The NHMTA's mission includes to promote a motor transport system that will serve the citizens of New Hampshire reliably, efficiently, safely, and economically; serve as a spokesperson for motor transport before federal,

state, and municipal governmental bodies; communicate the mission of motor transport to the general public through media and personal appearances; foster the principles of the Association through promotion of its services that may enhance the operation of its participating members; encourage cooperation, courtesy, and safety among highway users; and encourage construction and maintenance of safe and adequate highways. The Challenged Provisions explicitly affect the services of those of the NHMTA's delivery service members that are, have been, and/or desire to be engaged in the transportation of tobacco products to consignees in Maine, among other states.

8. The Massachusetts Motor Transportation Association, Inc. (the "MMTA"), which was founded in 1919, is a non-profit trade association that has more than 300 members engaged in the commercial delivery of packages containing property. The MMTA's mission includes to foster, develop, encourage, and promote the business of motor carrier transportation through the sound, economical, safe and efficient operations of its members; to encourage, maintain, and promote the inherent advantages of safe, and efficient highway transportation; to foster and maintain just and lawful trade practices in the motor carrier business and related businesses; and to strive for and encourage uniformity in motor carrier business practices and reciprocity among states with respect thereto. The Challenged Provisions explicitly affect the services of those of the MMTA's delivery service members that are, have been, and/or desire to be engaged in the transportation of tobacco products to consignees in Maine, among other states.

9. Founded in 1928, the Vermont Truck & Bus Association, Inc. ("VTBA") is a non-profit trade association that has more than 250 members. The VTBA's purposes include promoting the business of motor carrier transportation; enhancing the industry's efficiency, productivity, and competitiveness; and promoting highway safety. Its members operate truck fleets ranging from family-owned trucking businesses based in Vermont to large enterprises headquartered elsewhere. Most of its trucking members are engaged in the commercial delivery of packages containing property. These members include interstate package carriers, such as United Parcel Service and Federal Express, as well as truckload carriers, and regional carriers. The Challenged Provisions explicitly affect the services of those of the VTBA's delivery service members that are, have been, and/or desire to be engaged in the transportation of tobacco products to consignees in Maine, among other states.

10. The Carrier Associations have standing to bring suit on behalf of their members because their ground and air/ground intermodal carrier members otherwise would have standing to sue in their own right; the interests that the Carrier Associations seek to protect are germane to the Carrier Associations' purposes; and neither the claims asserted nor the prospective relief requested requires the participation of individual carrier members in the lawsuit. *See Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977).

11. Defendant G. Steven Rowe is sued in his official capacity as the Attorney General of the State of Maine. Under subsection 8 of 22 M.R.S.A. §1555-C, and subsection 3 of 22 M.R.S.A. § 1555-D, the Attorney General is responsible for enforcement of the Challenged Provisions

by seeking injunctive relief, fines, penalties, and equitable relief.

GENERAL ALLEGATIONS

12. The trucking industry is an essential component of the American economy. Americans and the American economy benefit from the cargo shipped by truck every day, including electronic equipment, shoes and clothing, agricultural goods, petroleum products, and machine parts. Trucks carry approximately 60% of the nation's domestic freight. In 1997 (the date of the last economic census), for-hire motor and air carriers transported more than 3.5 billion tons of goods, valued in excess of $4 trillion. The trucking industry's annual contribution to the gross domestic product is more than $260 billion.

13. Due to the popularity of the Internet, home shopping networks, mail-order catalogues, and various forms of "e-commerce," a significant portion of the retail transactions across the United States now takes place via direct sales transactions in which businesses and consumers communicate through the Internet, telephone, facsimile, or mail. A corresponding portion of the business of cargo carriers – including the Carrier Associations' members – is devoted to transporting and delivering the goods purchased in such transactions. These direct sales operations depend on interstate cargo carriers to transport and deliver the goods they sell; the carriers, in turn, depend on these operations for a significant portion of their business.

A. The Challenged Provisions Of The Maine Statute.

14. Although the United States Congress has mandated that carriers be subject exclusively to uniform federal laws in providing transportation and delivery services, Maine has enacted legislation that impermissibly regulates the manner in which carriers provide service. On June 9, 2003, Maine enacted Public Law 444, "An Act To Regulate the Delivery and Sales of Tobacco Products and To Prevent the Sale of Tobacco Products to Minors," which became effective on September 13, 2003 (the "Statute"). In relevant part, it enacted 22 M.R.S.A. sections 1555-C and 1555-D.

15. In relevant part, 22 M.R.S.A. §1555-C ("Delivery Sales Of Tobacco Products") provides as follows:

> (3) **Requirements For Shipping A Delivery Sale.** The following provisions apply to a tobacco retailer shipping Tobacco Products pursuant to a Delivery Sale.
>
> (A) Prior to shipping, the tobacco retailer shall provide to the Delivery Service the age of the purchaser . . .
>
> . . . .
>
> (C) The tobacco retailer shall utilize a Delivery Service that imposes the following requirements:
>
> (1) the purchaser must be the addressee;
>
> (2) the addressee must be of legal age to purchase tobacco products and must sign for the package; and

(3) if the addressee is under 27 years of age, the addressee must show valid government-issued identification that contains a photograph of the addressee and indicates that the addressee is of legal age to purchase tobacco products.

Elsewhere, the Statute defines the term "Delivery Service" to mean "a person, including the United States Postal Service, who is engaged in the commercial delivery of letters, packages or other containers." 22 M.R.S.A. § 1551(1-C). The Carrier Associations' members qualify as "Delivery Services" under the Statute. The Statute also defines a "Delivery Sale" as "a sale of tobacco products to a consumer in this state when . . . the tobacco products are delivered by use of a delivery service." 22 M.R.S.A. § 1551(1-B). Under Maine law, the term 'tobacco products' "includes any form of tobacco and any material or device used in the smoking, chewing or other form of tobacco consumption, including cigarette papers and pipes." 22 M.R.S.A. § 1551(3).

16. Thus, to lawfully be utilized to deliver packages containing tobacco products to an address in Maine, a carrier must:

- receive information from the shipper as to the purchaser's age;
- require that Maine-bound packages containing tobacco products be addressed to the purchaser;
- require that such purchasers be of legal age to purchase tobacco products;
- require that addressees of such packages personally sign for the package; and

- where the purchaser is indicated to be age 18 through 26, require that the purchaser show a valid government-issued photo-identification indicating that the purchaser is at least 18 years old.

17. Subsection (8) of 22 M.R.S.A. § 1555-C enables the Attorney General to enforce these provisions against tobacco retailers in district court or superior court, and to seek injunctive relief, fines, penalties and equitable relief for any violation. In addition, a violation of these provisions is considered a violation of the Maine Unfair Trade Practices Act, 5 M.R.S.A. § 205-A.

18. In relevant part, 22 M.S.R.A §1555-D ("Illegal Delivery of Tobacco Products") provides as follows:

> A person may not knowingly transport or cause to be delivered to a person in this state a Tobacco Product purchased from a person who is not licensed as a tobacco retailer in this state, except that this provision does not apply to the transportation or delivery of Tobacco Products to a licensed tobacco distributor or tobacco retailer. A person is deemed to know that a package contains a tobacco product if the package is marked in accordance with the requirements of Section 1555-C, Subsection 3, Paragraph B or if the person receives the package from a person listed as an unlicensed tobacco retailer by the Attorney General under this Section.

19. Thus, complying with the plain terms of section 1555-D requires a carrier making deliveries in Maine:

- to determine whether the shipper of each package traveling to Maine is on the Attorney General's list of known unlicensed tobacco retailers; and

- then, for any such package, either to prevent the package from being delivered, or
- to deliver it only after consulting the Attorney General's list of licensed tobacco retailers and determining that the recipient is either a licensed retailer or a licensed distributor;

- to examine each package traveling to Maine to determine whether it is marked as containing tobacco products; and
  - then, for any such package, to consult the Attorney General's lists of licensed tobacco retailers and distributors to determine whether the shipper or addressee is licensed either as a tobacco retailer or a tobacco distributor in Maine; and
  - if not, then to prevent the package from being delivered;
- to determine whether, even if not marked as containing tobacco products, the carrier knows that the package contains tobacco products; and
  - then, for any such package, to consult the Attorney General's lists of licensed tobacco retailers and distributors to determine whether the shipper or addressee is licensed either as a tobacco retailer or a tobacco distributor in Maine; and
  - if not, then to prevent the package from being delivered.

20. Subsection(2)(A) of 22 M.R.S.A. § 1555-D provides that a person who violates § 1555-D commits a civil violation for which a fine of not less than $50 nor more

than $1500 may be adjudged for each violation. Subsection(2)(B) of 22 M.R.S.A. § 1555-D provides that the employer of a person who, while working and within the scope of that person's employment, violates § 1555-D commits a civil violation for which a fine of not less than $50 nor more than $1500 may be adjudged for each violation.

21. Subsection (3) of 22 M.R.S.A. § 1555-D enables the Attorney General to enforce these provisions against carriers in district court or superior court, and to seek injunctive relief, fines, penalties and equitable relief for any violation. In addition, a violation of these provisions is considered a violation of the Maine Unfair Trade Practices Act, 5 M.R.S.A. § 205-A.

22. Except as set forth above, the Carrier Associations expressly do not challenge 2003 Public Law 444, or its enactment and/or amendment of 22 M.R.S.A. §§ 1551, 1555-C, and 1555-D. Those unchallenged provisions regulate purchasers and retailers of tobacco product delivery sales in a manner that does not relate to the carriers' prices, routes, or services.

B. Maine's Regulation Of, And Prohibition Of Delivery By, Carriers.

23. On August 28, 2003, the Tobacco Enforcement Coordinator of the State of Maine Office of the Attorney General, sent a letter addressed "Dear Delivery Service" to various carriers doing business in Maine, including members of the Carrier Associations. The letter informs carriers that "Maine has enacted a new law that affects delivery of tobacco products" and "regulates delivery sales of tobacco products" to consumers in Maine." The letter

explains that: "Delivery services are prohibited from delivering tobacco products to consumers in Maine unless purchased and shipped from a licensed tobacco retailer." It further informs carriers that they "must only accept shipments from retailers licensed by the Maine Department of Human Services," and encloses "a list of known unlicensed and licensed tobacco retailers." The letter notes that "[i]llegal delivery of tobacco products is a civil violation," subject to fines, and that under the Maine Unfair Trade Practice Act, the State may "obtain a court order enjoining a delivery service from delivering tobacco products to Maine consumers." Finally, the letter states: "We expect full compliance with this law."

C. The Preempting Federal Statute.

24. The United States Congress enacted the FAAAA effective January 1, 1995. The FAAAA provides in relevant part that "a State . . . *may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service*" of any motor carrier, or intermodal air/ground carrier with respect to the transportation of property. 49 U.S.C. § 14501(c)(1) (relating to motor carriers) (emphasis added); 49 U.S.C. § 41713(b)(4)(A) (relating to air and intermodal air/ground carriers) (emphasis added).

25. In enacting the FAAAA, Congress expressly found that the regulation of intrastate transportation of property by the states had "imposed an unreasonable burden on interstate commerce; [and] impeded the free flow of trade, traffic, and transportation of interstate commerce." FAAAA, Pub. L. No. 103-305, tit. VI, § 601(a)(1), 108 Stat. 1569, 1605 (1994). Through the FAAAA, Congress sought

to ensure that interstate carriers are able to provide service subject exclusively to a uniform body of federal law, and not by a "patchwork" of individual states' laws and regulations. H.R. Conf. Rep. No. 103-677, § 601, at 87 (1994), *reprinted in* 1994 U.S.C.C.A.N. 1715, 1759. Congress thereby intended to remove obstacles to "national and regional carriers attempting to conduct a standard way of doing business." *Id.* Congress specifically identified restrictions on "types of commodities carried" as one of the forms of state regulation eliminated by the FAAAA. *Id.* at 86, *reprinted in* 1994 U.S.C.C.A.N. at 1758.

26. Interpreting the air and intermodal carrier provision of the FAAAA, 49 U.S.C. § 41713, the United States Court of Appeals for the First Circuit has held that the FAAAA has a "broad reach," such that "[s]tate laws and regulations 'having a connection with or reference to' an air carrier's prices, routes or services are preempted." *United Parcel Serv., Inc. v. Flores-Galarza,* 318 F.3d 323, 335 (1st Cir. 2003). As the court held: "A sufficient nexus exists if the law expressly references the air carrier's prices, routes or services, or has a 'forbidden significant effect' upon the same." *Id.* (citation omitted).

27. In *Flores-Galarza,* the First Circuit held that the FAAAA preempted a Puerto Rico "statutory regime that prohibits an interstate air carrier from delivering any package unless the carrier first provides proof that the package's addressee has paid the appropriate excise tax, or the carrier prepays the amount of the tax on the addressee's behalf." *Id.* at 325. The court held that "[t]he challenged scheme both refers to and has a forbidden significant effect on [the plaintiff carrier's] prices, routes or services." *Id.* at 335.

28. Like the Challenged Provisions here, one aspect of the statutory scheme held preempted in Puerto Rico made certain deliveries unlawful. The court specifically held that the Puerto Rico statute that "forbids delivery unless and until a recipient produces a certificate from the Secretary ... significantly affects the timeliness and effectiveness of [the plaintiff carrier's] service" and was preempted. *Id.* at 335-36.

29. Also like the Challenged Provisions here, one aspect of the statutory scheme held preempted in Puerto Rico required carriers to take certain steps before they could make deliveries. The court specifically held that "the prepayment mechanism imposes extensive requirements that must be met before a carrier may make a lawful delivery," which imposed "a substantial burden on [the plaintiff carrier], in the form of additional labor, costs, and delays" and was preempted. *Id.* at 336.

D. The Challenged Provisions' Relation To Carriers' Services, Routes, And Prices.

30. The broad preemptive scope of the FAAAA precludes the enactment and enforcement of state laws related to carriers' services. Subsections (3)(A) and (3)(C) of section 1555-C violate that mandate because they expressly refer to and, indeed, regulate the manner in which carriers must operate in order to lawfully be utilized to transport Maine-bound packages containing tobacco products. Likewise, section 1555-D violates that mandate because it expressly refers to and, indeed, regulates the manner in which carriers must operate to avoid civil liability in transporting Maine-bound packages containing tobacco products.

31. Based on their express terms, the Challenged Provisions also have a significant effect on carriers' services. In order to comply with the Challenged Provisions, carriers have to devise and implement systems and procedures to:

(a) recognize when a Maine-bound package is indicated to contain tobacco products;

(b) determine whether the shipper of such packages is licensed in Maine as a tobacco retailer, and if the shipper is not so licensed, determine whether the addressee is licensed in Maine as a tobacco distributor or a tobacco retailer;

(c) for such packages, receive information about an addressee's age, and keep that information tied to the package as it moves through the carrier's system;

(d) require such packages to be delivered only to the named addressee (instead of to a mail room attendant, receptionist, or adult in a home);

(e) perform an identification check, when required for such packages;

(f) obtain a signature from the addressee of such packages; and

(g) make provisions for any such packages that the carriers determine cannot lawfully be delivered under the Maine Statute.

In addition, to comply with the Challenged Provisions, carriers have to devise and implement systems and procedures to:

(h) recognize when a Maine-bound shipment is from a shipper on the Attorney General's list of known unlicensed tobacco retailers;

(i) determine whether the addressee of such packages is licensed in Maine as a tobacco distributor or a tobacco retailer; and

(j) make provisions for any such packages that the carriers determine cannot lawfully be delivered under the Maine Statute.

32. As Congress expressly intended, *see* H.R. Conf. Rep. No. 103-677, at 87, *reprinted in* 1994 U.S.C.C.A.N. at 1759, motor and intermodal carriers of property rely on the efficiencies of uniform procedures to provide their transportation and delivery services within and among the 50 states. Carriers' operations are engineered to provide speed, reliability, and efficiency. In large part, they depend on uniformity – that is, repetition of the same processes and procedures for all packages regardless of their destination. Such uniformity allows superior, reliable services to shippers and their consignees, and is essential in a highly competitive industry with numerous competitors, including the United States Postal Service.

33. In order to comply with the Challenged Provisions, and lawfully be utilized by tobacco retailers, carriers are prevented from employing their uniform procedures for Maine-bound packages. This disruption in uniformity does and will have a significant effect on the manner, timeliness, and effectiveness of the carriers' services, and on carriers' routes and prices.

34. For example, 22 M.R.S.A. § 1555-C(3)(C)(2) requires that Maine-bound packages containing tobacco products be delivered personally to the purchaser/addressee.

However, carriers typically complete a delivery by transporting a package to the recipient's address, not to a particular person at that address. Even where carriers offer a service to obtain a delivery signature, typically that signature can be obtained from any person (or, where specified, any adult) at the delivery address. Thus, carriers routinely deliver signature-required packages to persons such as business receptionists, mail room attendants, and stay-at-home parents. Requiring delivery of such packages only to the specific addressee would preclude such routine practices, and would force carriers to alter their manner of delivering packages. Delivery drivers will have to spend extra time at each stop while attempting to locate the addressee. The requirement places burdens on carriers comparable to those faced by process servers – burdens that high-volume cargo carriers are ill-equipped to handle. This requirement also has a significant effect on carriers' routes, by forcing them to reroute packages back to the carriers' facilities, make multiple delivery attempts, and, in some cases, reroute a package back to the sender, if the addressee cannot be located.

35. Similarly, carriers have to create procedures to identify, segregate, and separately process Maine-bound packages containing tobacco products. Potentially *every* Maine-bound package has to be inspected for markings indicating a tobacco product. Every package so identified has to be researched to determine the licensing of its shipper, and possibly its addressee. Carriers also have to create procedures to identify and process packages shipped by retailers on the Attorney General's list of known unlicensed tobacco retailers. Finally, carriers have to create procedures for packages that cannot lawfully be delivered

to the addressee, or for which the addressees are not available for signature.

36. Implementing these procedures has a significant effect on carriers' costs (including labor), and therefore they are related to carriers' prices.

37. Faced with the burdens and disruptions on their uniform services imposed by the Challenged Provisions, some carriers may terminate all deliveries of tobacco products to Maine. The resulting termination of that service plainly is a significant effect on carriers' services.

38. Since carriers have to undertake special procedures for deliveries to Maine, the Challenged Provisions have the potential of slowing down the delivery of *all* packages destined for Maine – not merely those packages that are marked as or known to contain tobacco products. The myriad efficiencies that come from a uniform system of delivery, and the attendant benefits to consumers, will be lost.

COUNT ONE – SUPREMACY CLAUSE (FAAAA PREEMPTION)

39. Plaintiffs incorporate by reference all of the foregoing paragraphs as though set forth fully herein.

40. The United States Constitution gives Congress the power to enact the "supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. art. VI, § 3, cl. 2.

41. An actual controversy exists among the parties in that carriers have to meet the requirements of 22

M.R.S.A. § 1555-C in order to lawfully be utilized to deliver Maine-bound packages containing tobacco products, and have to comply with the requirements of 22 M.R.S.A. § 1555-D, and carriers contend that, pursuant to the Supremacy Clause, the FAAAA preempts enforcement of the Challenged Provisions.

42. Plaintiffs' members fear the civil penalties and enforcement actions authorized under 22 M.R.S.A. §§ 1555-D(2) and (3), and the loss of business from compliant retailers, if they fail to comply with the obligations directly and indirectly imposed by 22 M.R.S.A. § 1555-C.

43. The State has notified delivery services of the new law and warned them that "[i]llegal delivery of tobacco products is a civil violation, punishable by a fine of up to $1500," and that the State may obtain a court order "enjoining a delivery service from delivering tobacco products to Maine consumers." The threat that this preempted law will be enforced against the Carrier Associations' members is an irreparable harm that makes injunctive relief appropriate. In addition to the imminent enforcement of the Challenged Provisions, their unconstitutionality itself reinforces the irreparable harm carriers face.

44. The harm is irreparable for the additional reason that the Eleventh Amendment to the United States Constitution bars an award of retrospective monetary damages against the State or the individual defendant acting in his official capacity.

45. Plaintiffs are entitled to injunctive relief against enforcement of the Challenged Provisions because their members are and will continue to suffer irreparable harm

from enforcement of the challenged provision of the Statute.

COUNT TWO – 28 U.S.C. §§ 2201, 2202

(DECLARATORY RELIEF)

46. Plaintiffs incorporate by reference all of the foregoing paragraphs as though set forth fully herein.

47. Plaintiffs bring this cause of action pursuant to the Declaratory Judgment Act, 28 U.S.C. §§ 2201, 2202, to obtain a declaration of their members' rights with respect to the Challenged Provisions of the Maine Statute.

48. As alleged above, an actual controversy has arisen and now exists within the meaning of 28 U.S.C. § 2201, as to whether the Challenged Provisions are preempted by the FAAAA pursuant to the Supremacy Clause of the United States Constitution.

49. The Court has the power to adjudicate the rights of the parties with respect to this controversy and should grant declaratory relief under 28 U.S.C. § 2201.

WHEREFORE, plaintiffs respectfully request:

(a) a declaration that 22 M.R.S.A. §§ 1555-C(3)(A) and (C) are preempted by federal law under the FAAAA and the Supremacy Clause;

(b) a declaration that 22 M.R.S.A. § 1555-D is preempted by federal law under the FAAAA and the Supremacy Clause;

(c) a permanent injunction enjoining defendant from enforcing 22 M.R.S.A. § 1555-C(3)(A) and (C) altogether,

and from enforcing 22 M.R.S.A. § 1555-D as against motor carriers and air/ground intermodal carriers;

(d) an order granting plaintiffs the costs incurred to bring forth this Complaint; and

(e) such other and further relief as this Court may deem appropriate under law and equity.

Dated: October 10, 2003

PAUL T. FRIEDMAN
RUTH N. BORENSTEIN
LAWRENCE R. KATZIN
MORRISON & FOERSTER LLP
425 Market Street
San Francisco, CA 94105-2482
Telephone: (415) 268-7000

MICHAEL A. NELSON
JENSEN BAIRD GARDNER & HENRY
10 Free Street
P.O. Box 4510
Portland, ME 04112-4510
Telephone: (207) 775-7271

By: /s/
Michael A. Nelson

Attorneys for Plaintiffs
NEW HAMPSHIRE MOTOR TRANSPORT ASSOCIATION, MASSACHUSETTS MOTOR TRANSPORTATION ASSOCIATION, INC., and VERMONT TRUCK & BUS ASSOCIATION, INC.

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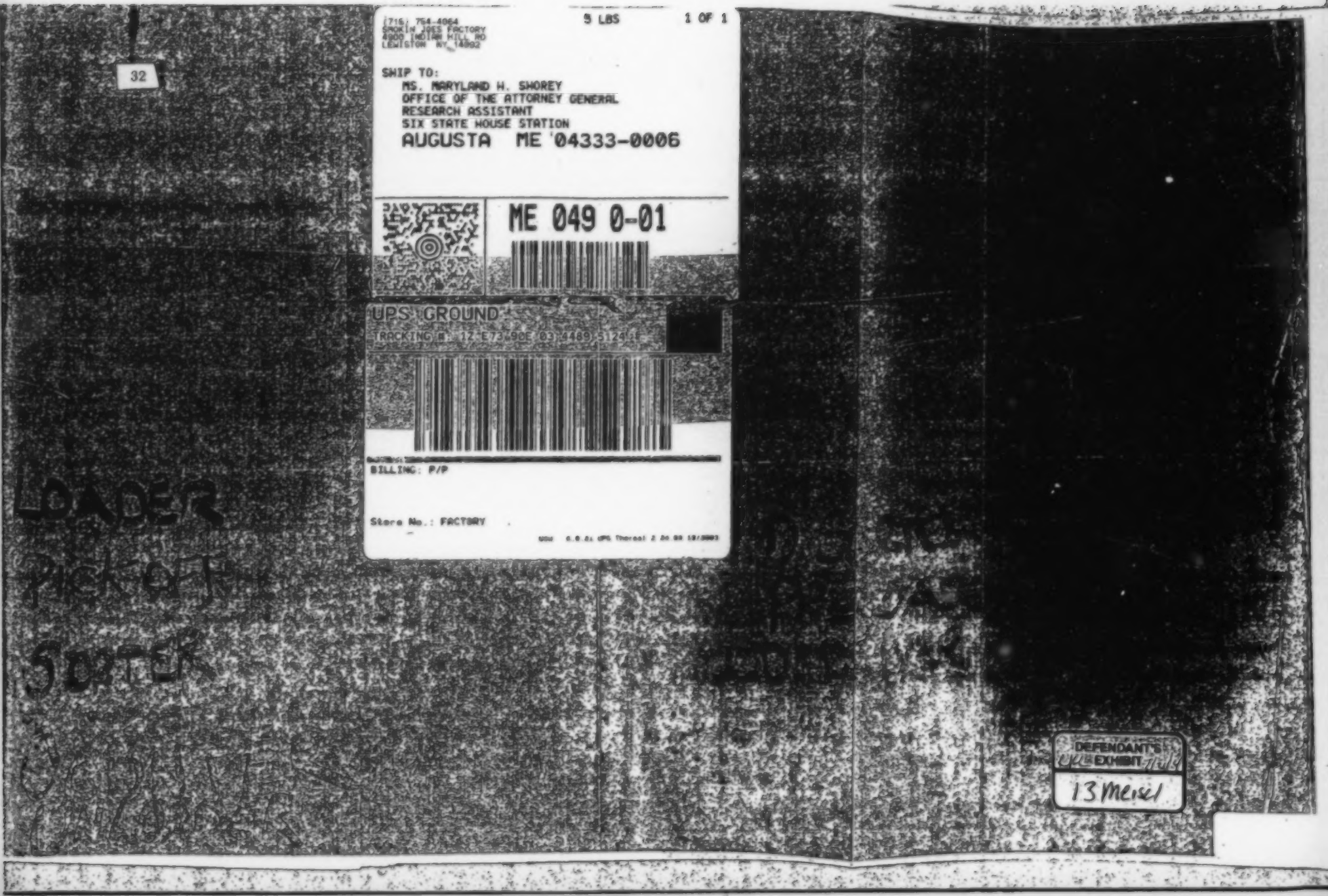

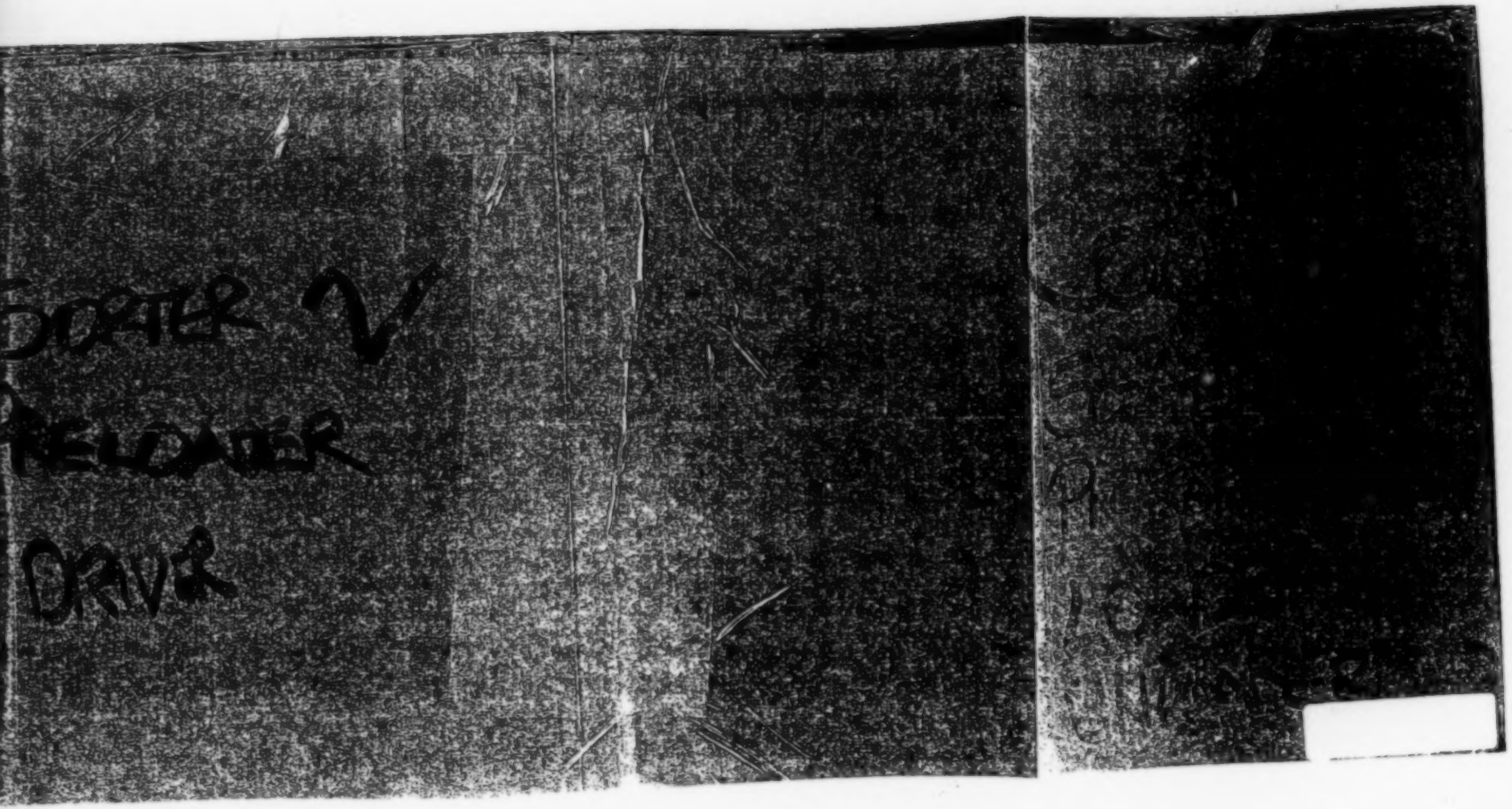
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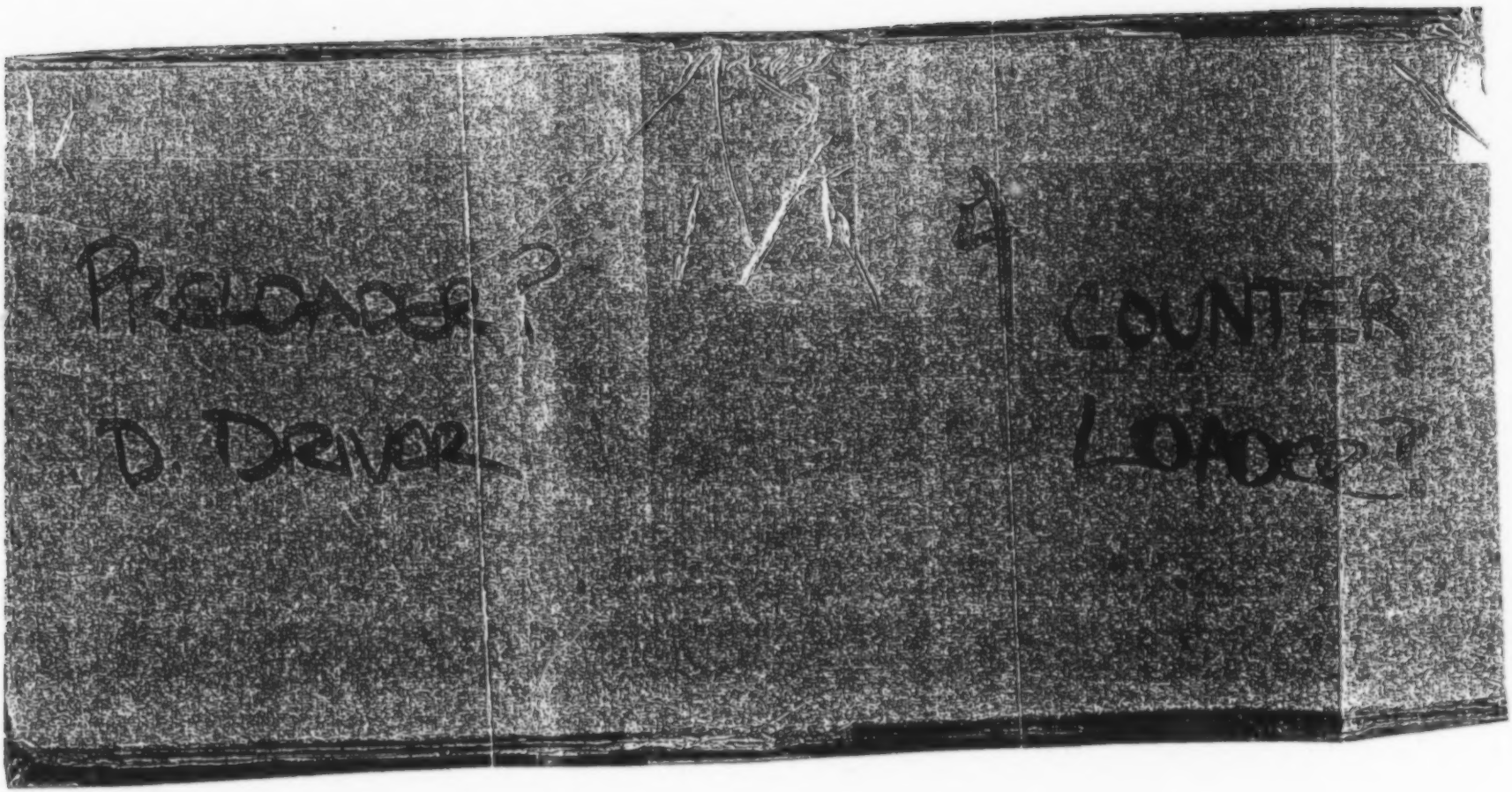
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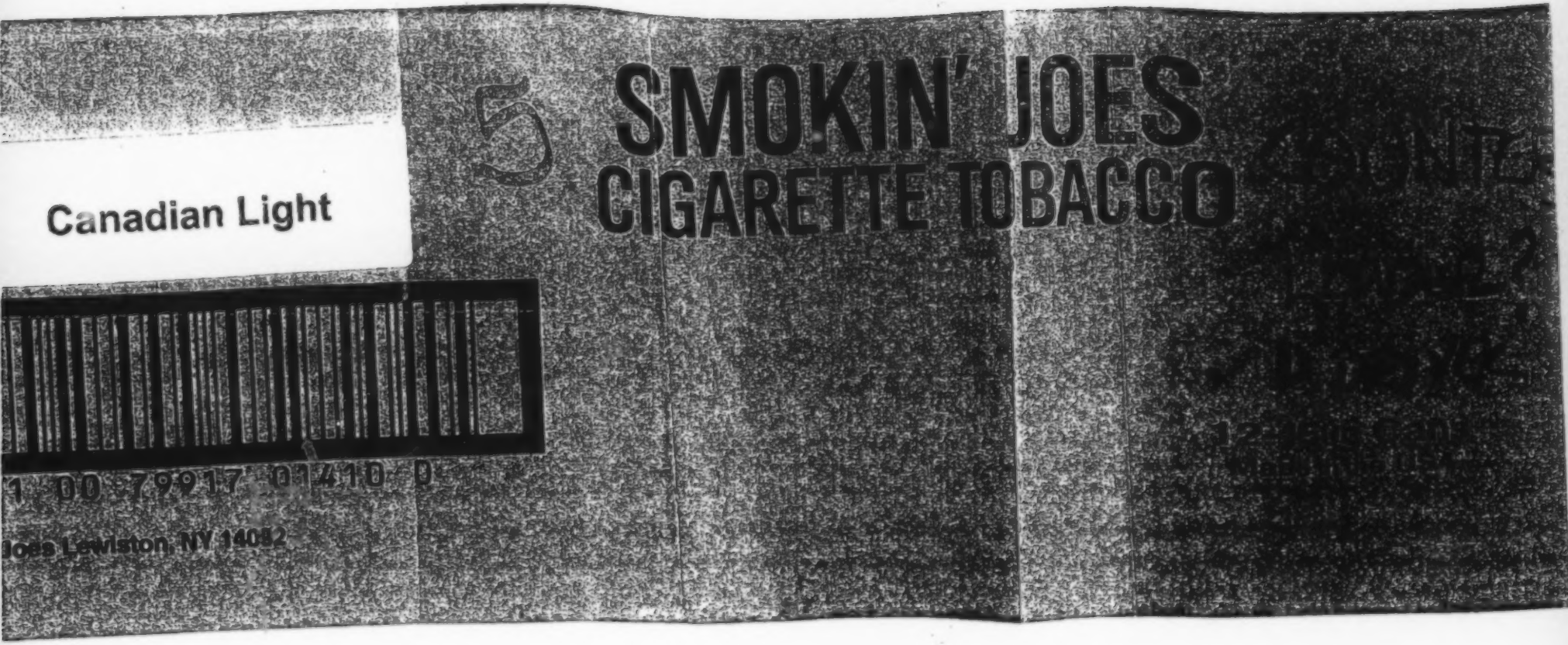
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BOX MEETS ALL CONSTRUCTION
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PRELOADER ?
D.DRIVER ?

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MAINE

NEW HAMPSHIRE MOTOR TRANSPORT ASSOCIATION, MASSACHUSETTS MOTOR TRANSPORTATION ASSOCIATION, INC., AND VERMONT TRUCK & BUS ASSOCIATION, INC. Plaintiffs, -v- G. STEVEN ROWE, in his official capacity as Attorney General of the State of Maine, Defendant.	Case No. 1:03-cv-178-DBH

DECLARATION OF DEBRA MEISEL
IN SUPPORT OF PLAINTIFFS' "AS APPLIED"
MOTION FOR SUMMARY JUDGMENT

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I, Debra Meisel, declare:

1. I have personal knowledge of the facts set forth below, and if called as a witness, I could and would so testify to them.

I. INTRODUCTION

A. Background and Experience with UPS's Services.

2. I am a Region Industrial Engineering Manager in the Corporate Industrial Engineering Department of United Parcel Service, Inc. ("UPS"), and work in UPS's corporate headquarters in Atlanta. I have been employed by UPS for 20 years in various capacities. I began my UPS career in Dallas in 1984 as a driver. In 1985, I was promoted to supervisor, initially in an Industrial Engineering position, then as an on-car (driver) supervisor. In 1988, I was promoted to be a Center Manager. In 1989, I was named to a Section Manager position in Industrial Engineering. In 1991, I was promoted to District Industrial Engineering Manager in the East Tennessee District. In 1994, I was named District Industrial Engineering Manager in the North New England District (which encompasses Maine). In 1997, I was named District Industrial Engineering Manager in the Central Florida District. In 1999, I was named to be the Industrial Engineering Manager for UPS Corporate Marketing in Atlanta. In 2001, I was promoted to Corporate Marketing Portfolio Manager. In 2003, I was placed in my current assignment. I am familiar with UPS's processes and procedures for the movement of domestic shipments.

3. Industrial Engineering is responsible for designing UPS operations in a manner that makes them produce the highest levels of service to our customers in the most efficient manner possible and at the lowest possible cost, in order to maintain our competitive advantages. To achieve these efficiencies and service levels, UPS, among other things, conducts time and motion studies to determine the most efficient way to perform UPS's services with the greatest speed, and with the highest comfort for and lowest risk to our employees. For example, UPS studies details as minute as what drivers do with the ignition key to their package cars when they are out of the vehicle delivering packages, in order to devise approved methods to minimize the time spent locating the key when returning to the vehicle. When UPS is able to shave even a second off a process that is repeated millions of times each day, it produces a material cumulative benefit to the overall efficiency of UPS's operations.

B. Background Facts About UPS.

4. UPS's principal business is the transport of packages throughout the United States, to and from the United States to 200 other countries around the world, and within certain other countries. UPS transports approximately 13.6 million packages each day – more than 3 billion packages each year. UPS transports approximately 65,000 packages per day, or 16 million packages per year, to the state of Maine. UPS is a member of the New Hampshire Motor Transport Association, the Massachusetts Motor Transportation Association, Inc., and the Vermont Truck & Bus Association, Inc.

5. I am informed and believe that one of UPS's operating entities, UPS Co., is authorized by the Federal Aviation Administration to operate as an air carrier for the transportation of property. Attached as Exhibit A to this declaration is a true and correct copy of UPS Co.'s Air Carrier Operating Certificate, issued by the Federal Aviation Administration. I am also informed and believe that another UPS entity, UPS, Inc., is engaged in the transportation of property by motor vehicle, and is affiliated with a direct air carrier, UPS Co., through common controlling ownership. Even where UPS operates as an air carrier, it uses ground vehicles to make its deliveries, including, for example, in Puerto Rico.

6. UPS has approximately 1.8 million shipping customers. It operates out of more than 1,700 operating facilities, and services 45,000 drop boxes for urgent letters and small packages. UPS operates a fleet of approximately 88,000 ground vehicles, and an air fleet of 269 jet aircraft (plus 313 chartered aircraft). Together, these aircraft serve 385 domestic airports and fly almost 1000 daily flight segments. UPS has more than 350,000 employees worldwide. More than 20,000 independently-owned shipping service centers also offer to ship packages for consumers using UPS services.

C. Shipping A Package By UPS.

7. There are various types of UPS shippers. For example, there are:

- account holders that receive daily pick-ups by a UPS driver;

- occasional shippers that call to request one-time pick-ups, or use the Internet to request on-call pick-ups, by a UPS driver;
- occasional Internet-based shippers that may hand their packages to any UPS driver that they see;
- occasional shippers who bring their packages to a UPS customer counter;
- occasional shippers who bring their packages to an independently-owned shipping service center, such as a UPS Store or Mail Boxes Etc. center; and
- shippers who make shipments by placing their packages in a UPS drop box.

8. With respect to packages shipped within the United States, shippers generally pack their own parcels and complete a shipping record that identifies the consignee's (recipient's) name and address, the weight of the package, and the number of packages. UPS shipping records and systems do not ask shippers from whom UPS picks up on a regular basis to identify the contents of packages traveling within the United States (except where shippers indicate that their packages contain hazardous materials – as defined and required by the United States Department of Transportation). While UPS has the right to open and inspect packages in its system, in the normal course of business, this action generally happens infrequently, such as when there is reason to suspect some violation of our Hazardous Materials Compliance Program procedures might be occurring or we have information that the package(s) might otherwise present some risk to our employees, customers or the general public.

9. UPS's Terms and Conditions of Service require shippers to ensure that a shipment tendered to UPS does not violate any federal, state, provincial, or local laws or regulations applicable to the shipment. UPS does not permit shippers to transport alcoholic beverages to states that prohibit or restrict such transportation. UPS does not ordinarily make an independent determination about whether a shipper or consignee is licensed by a state.

D. UPS's Transportation Services Depend on Uniformity, Efficiency, Speed, and Reliability.

10. UPS's delivery operations function as an integrated system, requiring extensive planning and coordination among its operating facilities, ground fleet, and, air fleet. UPS's transportation and distribution networks are engineered in great detail to provide speed, reliability, and efficiency. Those networks are based on uniformity – that is, repetition of the same processes and procedures for the documentation of packages, pick up of packages from shippers, and delivery to consignees, for all packages regardless of their destination – because uniformity leads to superior, reliable services to shippers and their consignees, and is essential to UPS's survival in a highly competitive industry. Uniformity of operations and processes and efficiency keep down a UPS's overall costs, and therefore affect the prices that UPS charges.

11. UPS is widely regarded as one of the most efficient organizations in the world. This efficiency is due in large part to the uniformity described herein. UPS's system leads not only to superior, reliable services to shippers and their consignees, it is essential to UPS's price competitiveness in a highly competitive industry with

numerous competitors, including the United States Postal Service, which has its parcel business subsidized by its monopoly on first class mail. In the highly competitive cargo transportation business, carriers stake their reputations on the prompt and efficient delivery of packages because customers judge carriers by their efficiency, price, and service.

12. UPS uses a "hub-and spoke" system, which consists of an extensive network of sorting facilities located throughout the country (and the world) that generally works as follows:

- a shipper provides delivery information on UPS's shipping form or through an electronic shipping system (i.e., a computer running UPS-supplied or UPS-approved software, or a computer connected to UPS's shipping web site);
- the package enters UPS's system through a package car driver pick-up (including a pick-up from an intermediary shipping outlet such as a Mail Boxes Etc. center or pick-up from a UPS drop-box), or through UPS's customer counter;
- the package car driver brings the picked-up packages back to a local operating center;
- the packages are unloaded and placed on conveyor belts for sorters to separate them based on delivery location and the delivery time commitment;
- feeder vehicles and, in some cases, airplanes and trains take packages from the centralized hubs to other hubs for further sorting, and ultimately to local centers for delivery; and

- at the local center, packages are further sorted and loaded onto package cars for delivery based on each consignee's address.

13. To comply with federal laws and UPS policy, UPS requires customers tendering certain packages, such as those containing hazardous materials, to meet specific nationally-uniform identification (and other) requirements that do not vary by state of destination. Under its standard procedures, UPS preloaders do not have to search for or read text on a package in order to identify it as requiring special handling, except to the extent such text might appear on such a nationally uniform identifying sticker.

14. UPS offers numerous types of shipping services, which vary, among other things, by scheduled delivery time. For example, and by way of general description:

- UPS Sonic Air® offers same-day delivery;
- UPS Next Day Air Early A.M.® offers next-day delivery by 8:30 a.m. to most locations,
- UPS Next Day Air® offers next-day delivery by 10:30 a.m. to most locations;
- UPS Next Day Air Saver® offers next-day service by the end of the day;
- UPS 2nd Day Air A.M.® offers delivery before noon on the second business day;
- UPS 2nd Day Air® offers delivery before the end of the second business day;
- UPS 3 Day Select® offers delivery by the end of the third business day; and

- UPS Ground offers delivery by the end of the promised day (which depends on the shipping distance).

15. UPS guarantees delivery at a time and date certain after a package has been picked up, and if a package is not timely delivered, UPS will, on request and subject to certain conditions, provide a full refund or credit of the shipping charges.

16. In order to meet its delivery deadlines, UPS must avoid even minor delays. Delays or disruptions at any point in UPS's operations can affect thousands of packages in transit. For example, since no truck can leave an operating center until the sorting and loading process is completed, delays of just a few minutes in the sorting and loading can cause UPS to miss guaranteed delivery commitments for packages on every truck being loaded.

I. FACTS REGARDING HOW UPS COMPLIES 22 M.R.S.A. § 1555-D.

A. Operational Effects Of Complying With Section 1555-D.

17. Because, in accordance with Section 1555-D, a person is deemed to know that a package marked in accordance with Section 1555-C(3)(B) contains tobacco products, in order to comply with Section 1555-D, UPS must take steps (1) to identify packages bound for delivery in Maine that are marked as containing tobacco products and (2) to ensure that such packages are not delivered in violation of Section 1555-D.

18. In order to identify packages bound for delivery in Maine that are marked in accordance with Section

1555-C(3)(B), as is necessary to comply with Section 1555-D, UPS instructs its preloaders (who load package cars for deliveries) to devote extra time to visually scan the six-sided exterior of every package to be delivered in Maine in order to determine if the shipper has marked the package with text indicating that the package contains tobacco products.

19. UPS preloaders would not ordinarily visually scan the six-sided exterior of packages to search for or read text that does not appear on a package's label (or a nationally uniform identifying sticker). Not having preloaders inspect or otherwise determine the contents of packages, or visually scan the six-sided exterior of packages to search for and read text, permits UPS to streamline package handling and avoid interruptions and delays.

20. UPS also instructs those preloaders to read the consignee's and shipper's names on the label of every package to be delivered in Maine to determine if the names suggest that the package may contain tobacco products. In the absence of the statutory requirements, preloaders normally would not have to read and consider a shipper's name, and only occasionally would have to read a consignee's name. Having to read shipper and consignee names on every package adds delay to a preloader's tasks.

21. Having preloaders determine whether a package is indicated to contain a tobacco products in the manner described above materially adds to the processing and sorting time for every package processed for delivery in Maine.

22. For every package that is bound for delivery in Maine and is marked as containing a tobacco product in

accordance with Section 1555-C(3)(B), or that has a shipper or consignee name that indicates that the package likely contains tobacco products, UPS removes the package from the normal transportation and delivery procedures, to have its personnel research whether the consignee is licensed in Maine as a tobacco distributor or retailer.

23. According to the lists that the Maine Attorney General's office provided to UPS, there are more than 2,600 licensed tobacco retailers in Maine, and approximately 40 licensed tobacco distributors in Maine.

24. Determining whether the consignee of a tobacco products package is a licensed retailer or distributor materially adds to the processing and sorting time for such packages.

25. If UPS determines that the consignee of such a tobacco products package is not licensed as a tobacco retailer or distributor in Maine, then UPS arranges to have the package returned to the shipper. If the shipper of such a package is located in Maine but is not a licensed distributor or retailer, a return-to-sender delivery itself would violate Section 1555-D. In such circumstances, UPS has to contact the shipper and ask that the shipper retrieve the package from UPS, or failing that, to otherwise dispose of the package.

26. Returning an undeliverable tobacco products package to its shipper, or otherwise arranging for its disposition materially adds to UPS's costs of handling such packages.

27. But for Section 1555-D, UPS would not have to use extra procedures to identify packages for Maine

consignees containing tobacco products and to determine whether they can be delivered.

B. Additional Effects Of Complying With Section 1555-D.

28. Implementing procedures for dealing with packages marked as containing a tobacco product in accordance with Section 1555-C(3)(B), or otherwise indicated to contain tobacco products, requires that UPS provide special training to its preloaders and drivers in (1) performing six-sided visual scans, (2) recognizing packages marked or otherwise indicated to contain tobacco products, and (3) removing such packages from the sort for special handling. Implementing procedures for dealing with packages believed to contain a tobacco product requires that UPS provide special training to personnel assigned the task of researching whether the consignee of such packages is licensed as a tobacco distributor or retailer in Maine.

29. But for Section 1555-D, carriers would not have to undertake any of the extra training set forth above. Undertaking the specialized training set forth above increases UPS's cost of conducting business.

II. FACTS REGARDING HOW UPS LAWFULLY COULD BE UTILIZED TO MAKE DELIVERIES OF TOBACCO PRODUCT DELIVERY SALES PURSUANT TO 22 M.R.S.A § 1555-C.

A. UPS's "Delivery Confirmation Adult Signature Required" Service Does Not Meet The Requirements Of Section 1555-C(3)(C).

30. UPS offers shippers the opportunity to specify that designated shipments can only be delivered to an

adult 21 years of age or older; this service is known as "Delivery Confirmation Adult Signature Required" ("DCASR"). UPS's shipper must request DCASR at the time of shipment, and must pay an additional fee, which is presently $2.75 (comprised of a $1.00 surcharge for delivery confirmation and a $1.75 additional charge for the adult signature requirement).

31. In relevant part, the DCASR service is described in UPS's Terms and Conditions as follows:

> Delivery Confirmation Adult Signature Required – A shipper may request UPS to obtain the signature of an adult 21 years of age or older and to include it in the Delivery Confirmation response. An additional charge, set forth in the UPS Rates applicable to the shipment in effect at the time of shipping, will be assessed. UPS, in its sole discretion, will determine if delivery can be completed when such a request is made, and may request photo identification indicating the recipient's age, before completing delivery.

32. When a UPS shipper requests DCASR on a particular package, the fact that the shipper has requested this service typically is embedded in a "smart" label attached to the package – i.e., a label that, when electronically scanned by a delivery employee, can convey embedded information or alerts. In general, shippers who use UPS-supplied or UPS-approved electronic shipping systems can generate and affix smart shipping labels to packages before they are tendered to UPS. At the time of delivery, the UPS service provider then receives a prompt on his or her DIAD device (the clipboard computer that drivers carry), which instructs the service provider to

deliver only to an adult age 21 or older, and to obtain the signature of the adult who receives the package.

33. The UPS service provider may deliver a DCASR-designated package to, and obtain the confirmation signature from, any adult at the delivery address who is age 21 or older; the signature is not required to be from the named addressee. Thus, for example, when DCASR has been requested, UPS is free to deliver to, and obtain a confirming signature from, a mail room attendant or receptionist of appropriate age who is at the delivery address. Because UPS is free to deliver to any adult at the delivery address, UPS does not require that shippers who request the DCASR service provide UPS with the named addressee's actual age.

34. In completing the delivery of a package on which DCASR has been requested, the UPS Service Provider does not necessarily obtain photo identification to confirm the age of the person accepting delivery. If the Service Provider in his or her discretion suspects that the person may be younger than 21, then he or she would request identification.

35. Once the delivery has been completed, UPS sends the shipper a notice, in a printed or electronic format, confirming the delivery.

B. To Satisfy § 1555-C(3)(A), UPS Would Have To Receive The Age Of The Purchaser.

36. Under Section 1555-C(3)(A), in connection with Maine-bound delivery sales of tobacco products, a tobacco retailer is required to provide to the delivery service the age of the purchaser.

37. UPS uses standardized paper shipping forms and/or standardized electronic shipping systems to collect information about each shipment it carries, but does not include a field on its forms or in its systems in which the addressee's age could be recorded, and does not otherwise collect consignee age information from its shippers.

38. In order to give shippers of Maine-bound, tobacco-product delivery sales the opportunity to identify the age of their purchasers/consignees in the most effective manner, UPS would have to revise its customer shipping systems and its standardized paper shipping forms used anywhere in the world for shipments to or within the United States to provide a field for the shipper to provide such information, and would have to modify, on a worldwide basis, the information systems that it uses to receive and process package information to provide for that additional field of data.

39. Alternatively, UPS would have to devise another method of recording that information, such as by requiring shippers of Maine-bound tobacco product delivery sales to mark the consignee's age on the package at the same place where the package is marked as containing a tobacco product pursuant to Section 1555-C(3)(B).

C. To Satisfy § 1555-C(3)(C)(3), UPS Would Have To Create A New Service That Promised Different Identification Checks.

40. In accordance with Section 1555-C(3)(C), retailers of Maine-bound tobacco product delivery sales are required to utilize a delivery service that will require checking the identification of any consignee under the age

of 27 before making delivery to ensure that the consignee is of legal age (at least 18) to receive tobacco products.

41. UPS's Delivery Confirmation Adult Signature Required Service does not require checking the identification of any consignee under the age of 27 before making delivery. UPS's Delivery Confirmation Adult Signature Required Service does not allow deliveries to persons who are between the ages of 18 and 20.

42. In the UPS system, the best way to alert a delivery employee that a consignee identification check is required would be to embed such information in a smart shipping label. In order to offer shippers the ability to generate smart labels reflecting the requirements of Section 1555-C(3)(C), all UPS-supplied and UPS-approved electronic shipping systems would have to be re-engineered to recognize and embed an alert for each package that (1) is bound for an address in Maine; (2) contains tobacco products as defined by the Maine statute; and (3) is bound to an addressee who is 18 to 26 years old. UPS also would have to re-engineer its DIAD devices and supporting information systems to read and recognize such an alert.

43. In the absence of smart labels, if UPS required that shippers of tobacco products to Maine write the age of the addressee on the package at the same place where they mark the package as a tobacco product shipment pursuant to Section 1555-C(3)(B), or if UPS otherwise first learned that a package contained a tobacco product when preloaders performed a six-sided visual scan and detected a marking made in accordance with Section 1555-C(3)(C), then UPS would have to devise a method for the employees who research the deliverability of such packages also to

alert the delivery person to perform the identification check, such as by creating a special stamp or label to be affixed on approved packages.

D. To Satisfy § 1555-C(3)(C)(1) & (2), UPS Would Have To Create A New Service That Promised Delivery To, And A Confirming Signature From, Only The Named Addressee.

44. In accordance with Section 1555-C(3)(C)(1) and (2), retailers of Maine-bound tobacco product delivery sales are required to utilize a delivery service that will require that shipments of such packages be addressed to, and signed for personally by, the purchaser.

45. UPS's Delivery Confirmation Adult Signature Required Service does not require personal delivery to, and confirming signature from, only the named consignee – as opposed to a mail room attendant, receptionist, or any other person at the delivery address or, upon request, to any adult at the delivery address.

46. Delivering a package exclusively to, and obtaining a delivery signature exclusively from, the named addressee would considerably expand the amount of time that a UPS delivery person would have to spend at a delivery stop.

47. Because Section 1555-C(3)(C) requires that a consumer who purchases a delivery-sale of tobacco products personally sign for the delivery, UPS expects that consumers who work outside the home during the typical work day (when UPS makes its deliveries) will either have to direct those shipments to their workplace or make arrangements to be home at the anticipated time for the

delivery. In the typical workplaces where UPS makes deliveries, a designated employee or type of employee usually is assigned the task of receiving cargo deliveries, such as a mail room attendant or receptionist. But in Maine, UPS would not be able to deliver tobacco product delivery sales to such third parties, but instead would have to ask that person to contact the addressee and ask the addressee to come to the delivery area.

48. Based on my 20 years experience working with UPS, including as a driver, and my knowledge of the personal and work habits of my friends, family and co-workers, I believe that, in some instances when UPS would attempt a workplace delivery of a tobacco product delivery sale in Maine, the consignee and the delivery area will be located in different buildings, or on different floors of the same building. In some instances, the consignee may be on the phone or have stepped away momentarily from his or her workstation or might otherwise be unavailable to come to the delivery area. In some instances, it could take several minutes just to determine that the consignee is not even available to sign, in which case the process would have to be repeated the next day. Many classes of workers rarely (if ever) would be available to sign for such a package at a fixed address – such as truck drivers, police officers, construction workers, repair workers, and traveling sales representatives – and UPS might have to make repeated, futile attempts to deliver such packages to such people.

49. When a delivery is to be made to a residence, the addressee may not be at home at the time that the delivery person attempts the delivery, even if another adult is present at the residence.

50. Attempting to deliver a package only to the named addressee could cause substantial delays on a delivery employee's delivery route, and thus threaten the timely delivery of other packages on the employee's route. In many cases, UPS likely would have to arrange to return packages containing delivery sales of tobacco products to the sender because it would be unable to make a successful delivery to the addressee.

51. To impose a specific requirement on its shippers that Maine-bound packages containing delivery sales of tobacco products (1) be addressed to the purchaser and (2) be shipped only to purchasers of legal age to purchase tobacco products, UPS would have to alter, on a worldwide basis, its contractual and related documents that contain the terms and conditions of its service.

52. To develop package delivery routes within a particular area, UPS conducts time studies to determine, on average, how long the driver will require at delivery stops and how long the driver will require between delivery stops. UPS relies on those time studies to create delivery routes in which, given known or expected package volumes, drivers can complete all assigned package deliveries on their routes within the delivery deadlines for such packages. To increase efficiency, UPS relies on its time studies and historical data and puts drivers on the road only as required by the package volume for a particular day. The time required to complete a delivery stop that required delivery only to the named addressee (or to determine that such a delivery could not be completed) could vary widely – from a few seconds to several minutes – depending on the proximity and availability of the consignee at the time of delivery. If UPS were to offer such a service, it conceivably would have to

dispatch additional delivery routes to offset the increased delivery time of such packages.

53. UPS determined that it is not practical for it to offer a service that guarantees delivery only to the named addressee because doing so would cause drivers to spend too much time per stop, would threaten on-time delivery of packages on a driver's route, and/or would force UPS to use more drivers per package, on modified routes, and thereby raise operating costs and prices.

54. If making personal deliveries of tobacco product delivery sales caused UPS drivers in Maine to have their workdays extended by one half hour, UPS would incur additional annual operating expenses of approximately $1.8 million – $60,000 annually for each additional workday minute.

III. UPS'S DETERMINATION THAT IT WOULD BE TOO BURDENSOME AND COSTLY TO ALTER ITS SERVICES TO MAKE ALL PERMISSIBLE DELIVERIES OF TOBACCO PRODUCTS ALLOWED BY THE CHALLENGED PROVISIONS.

55. UPS examined how it could best comply with the Challenged Provisions' restrictions that (1) allow deliveries of tobacco products to persons other than licensed retailer or distributors, but only if the shipper of such a package is a licensed retailer, and (2) provide that a carrier is deemed to know that a package contains tobacco products if it is received from a person on the Attorney General's list of unlicensed tobacco retailers.

56. To the extent that known unlicensed shippers were UPS account holders who receive daily pick-ups, UPS

determined that the least disruptive way to recognize their packages that were transported to Maine for delivery would be to specially process such shippers' packages at the point of origin into UPS's transportation system. Shippers on the Attorney General's list of known unlicensed shippers could contain retailers located in any of the 50 states, and could contain retailers located outside of the United States and, thus, could require that UPS institute such special procedures throughout its operations, not just in Maine. Moreover, known unlicensed shippers potentially could avoid UPS's special processing of their Maine-bound packages by introducing them to UPS's system through a storefront shipping outlet such as a Mail Boxes Etc. center.

57. UPS concluded that the only way that UPS could ensure that it was not delivering packages in Maine from known unlicensed tobacco would be to research every package to be delivered in Maine to determine if the shipper was on the list of known unlicensed shippers. The time and effort required to conduct such research would have a tremendous adverse impact on UPS's operations, and would have slowed all UPS deliveries in Maine to a near standstill.

58. UPS determined that, for at least three reasons, as of the effective date of the Challenged Provisions, it could no longer feasibly deliver tobacco products in Maine except to licensed retailers and distributors: (1) efforts to identify all Maine-bound shipments from shippers on the list of known unlicensed shippers would be too disruptive of UPS operations in and outside of Maine, and would not always be effective; (2) UPS offered no service that met Section 1555-C's manner-of-delivery requirements for tobacco product delivery sales, so UPS could not lawfully

be hired to make such deliveries to consumers; and (3) UPS determined that it would be operationally impractical to implement new services and procedures that would comply with Section 1555-C's manner-of-delivery requirements because such services and procedures likely would be costly to design and implement, and likely would have been disruptive to UPS's Maine delivery operations. In light of these extreme burdens, UPS concluded that the only possible way that it could make lawful deliveries of tobacco products to Maine would be to make deliveries only to licensed retailers and distributors and not to any other lawful consignee.

59. On September 10, 2003, UPS sent letters to its United States customers known or believed to be shippers of tobacco products, in which UPS notified them that, as of September 13, 2003, UPS would no longer accept any tobacco products shipments to the State of Maine except to recipients who are licensed tobacco distributors or retailers. A true and correct copy of that letter is attached hereto as Exhibit B.

60. UPS took steps to train its personnel in Maine – a total of approximately 600 employees – to comply with Section 1555-D and to reflect the change in UPS's policy regarding the delivery of tobacco products only to licensed retailers and distributors in the State of Maine. Specifically, UPS's training efforts consisted of the following steps:

- UPS made available to each of its operating centers in Maine lists of current licensed tobacco retailers and licensed distributors in Maine, to whom packages containing tobacco products may lawfully be delivered;

- UPS disseminates updated lists of licensees to its operating centers in Maine, as updates become available;
- UPS instructed every operating center in Maine to establish procedures for all pre-loaders and drivers to ensure that they do not load or deliver packages containing tobacco products to unlicensed Maine consignees;
- On September 12, 2003, every business center in Maine dedicated its morning meeting with all preloaders and drivers of UPS delivery vehicles (before the loading and delivery of packages to be delivered that day) to the new procedures for Maine tobacco products;
- At that meeting, preloaders and drivers were briefed on each business center's procedures for ensuring that no package containing tobacco products is delivered to unlicensed consignees in Maine; specifically, preloaders and drivers were taught: (i) what constitutes a "tobacco product" under Maine law; (ii) how to identify packages that the preloader or driver knows or believes may contain tobacco products destined for addresses in Maine; (iii) how to determine whether a package containing tobacco products is destined for licensed consignee in Maine; and (iv) in the event that a package containing tobacco products is destined for an unlicensed consignee in Maine, to return the package for redelivery to the sender, to hold the package for pick-up by the sender or to destroy the package.

- To date, there have been two additional follow-up trainings to existing employees; in addition, training is given to all new preloader and driver hires.

61. UPS adopted its policy of delivering packages containing tobacco products only to licensed consignees in Maine to avoid the disruption and burden on UPS's operations caused by the Challenged Provisions, but UPS's policy has not eliminated such disruption and burden altogether.

62. UPS's compliance with Section 1555-D, through the operations procedures and training methods summarized above, continues to burden UPS with the costs and operational requirements involved in the following compliance efforts, among others: (i) maintaining and disseminating current lists of licensed consignees; (ii) training its personnel to follow the procedures UPS has enacted to comply with Section 1555-D; (iii) having preloaders and drivers identify packages that do or may contain tobacco products; (iv) having personnel research the addressees of such packages to determine whether the package may be delivered consistent with UPS's policy; and (v) returning or otherwise disposing of packages containing tobacco products that are destined for unlicensed consignees.

63. UPS has estimated that identifying packages that may contain tobacco products has added approximately two seconds to the processing time of each of the approximately 65,000 packages that UPS process for delivery in Maine each day, at a cost to UPS of approximately $12,000 per month. My own review of UPS time study benchmarks corroborates that approximately two seconds per package could be added to the time spent

by a UPS preloader following the methods described above. Based on established time studies for analogous look-up tasks, UPS estimates that, when packages are identified to contain tobacco products, it costs UPS approximately $2 per identified package to research whether the consignee is a licensed retailer or distributor.

64. In addition to the costs UPS has incurred in the course of ensuring its compliance with Section 1555-D, UPS has lost revenue as a result of turning away business that it lawfully could deliver even after the Challenged Provisions became effective, namely, tobacco product shipments to Maine from retailers licensed by Maine.

IV. PROPOSED RULES ISSUED BY THE MAINE DEPARTMENT OF HEALTH AND HUMAN SERVICES.

65. I am informed and believe that, on July 27, 2004, the Maine Department of Health and Human Services proposed rules relating to the Challenged Provisions.

66. The only item in the proposed rule that would affect the burdens set forth in this declaration relates to placement of the marking made in accordance with Section 1555-C(3)(B) indicating that a package contains tobacco products. If the proposed rules become effective in their present form, UPS would be deemed to know that a package contained tobacco products if a marking made in accordance with Section 1555-C(3)(B) appeared on any of the six sides of a package other than the side opposite the label. As a result, UPS would have to conduct five-sided visual scans of all packages to be delivered in Maine to search for and read text that may constitute such a

marking, but not six-sided scans. In all other respects, the burdens placed on UPS would remain unchanged.

67. This minor change affecting only a single aspect of UPS's compliance efforts would have only a minimal effect on UPS. If the proposed rules become effective in their present form, the Challenged Provisions still would slow and disrupt UPS's delivery operations in Maine.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct, and that this declaration was executed in Atlanta, Georgia on August ___, 2004.

/s/ Debra Meisel
Debra Meisel

UNITED STATES DISTRICT COURT

FOR THE
DISTRICT OF MAINE

NEW HAMPSHIRE MOTOR TRANSPORT ASSOCIATION, MASSACHUSETTS MOTOR TRANSPORTATION ASSOCIATION, INC., AND VERMONT TRUCK & BUS ASSOCIATION, INC., Plaintiffs, v. G. STEVEN ROWE, in his official capacity as Attorney General for the State of Maine, Defendant.	CIVIL ACTION NO.: 03-CV-178-B-DBH

DEFENDANT'S RESPONSE TO PLAINTIFFS' STATEMENT OF UNDISPUTED MATERIAL FACTS

Pursuant to Fed. R. Civ. P. 56 and Local Rule 56(c), defendant, Maine Attorney General G. Steven Rowe, hereby submits its statement of material facts in opposition to plaintiff's motion for summary judgment. Defendant hereby responds to each fact set forth in plaintiff's statement of facts and submits certain additional facts. In responding to plaintiff's statement of facts, defendant, by admitting, denying or qualifying the facts, does not concede that any of the facts are material.

Response to Plaintiff's Statement of Facts

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4.: UPS delivers approximately 13.6 million packages per day, including approximately 65,000 packages per day in Maine. (Meisel Decl. ¶ 4; Meisel Dep. at 82:24, 87:23-88:5, Deposition of John Butler, attached as Exhibit F to the Declaration of Ameri R. Giannotti In Support Of Plaintiffs' "As Applied" Motion For Summary Judgment, filed herewith ("Butler Dep.") at 57:15-17, 81:7-13.)

***Response*: Admit.**

5.: In addition to operating as a motor carrier, one of UPS's operating entities, UPS Co., is authorized by the Federal Aviation Administration to operate as an air carrier for the transportation of property. Even where UPS operates as an air carrier, it uses ground vehicles to make its deliveries. (Meisel Decl. ¶ 5.)

***Response*: Admit.**

6.: UPS's delivery operations function as an integrated system, requiring extensive planning and coordination among its operating facilities, ground fleet, and, air fleet. (Meisel Decl. ¶ 10; Meisel Dep. at 78:23-79:10, 117:10-19.)

***Response*: Admit.**

7.: UPS's transportation and distribution networks are engineered in great detail to provide speed, reliability, and efficiency. Those networks are based on uniformity – that is, repetition of the same processes and procedures for the documentation of packages, pick up of packages from shippers, and delivery to addressees, for all packages regardless of their destination – because uniformity leads to superior, reliable services to shippers and their addressees,

and is essential to UPS's survival in a highly competitive industry. In the highly competitive cargo transportation business, carriers stake their reputations on the prompt and efficient delivery of packages because customers judge carriers by their efficiency, price, and service. (Meisel Decl. ¶ 10; Meisel Dep. at 22:21-23:2, 80:19-25, 89:2-8.)

***Response*: Admit.**

8.: Uniformity of operations and processes and efficiency keep down a UPS's overall costs, and therefore affect the prices that UPS charges. (Meisel Decl. ¶ 10.)

***Response*: Admit.**

9.: UPS uses a "hub-and spoke" system, which consists of an extensive network of sorting facilities located throughout the country (and the world) that generally works as follows:

- a shipper provides delivery information on UPS's shipping form or through an electronic shipping system (i.e., a computer running UPS-supplied or UPS-approved software, or a computer connected to UPS's shipping web site);
- the package enters UPS's system through a package car driver pick-up (including a pick-up from an intermediary shipping outlet such as a Mail Boxes Etc. center or pick-up from a UPS drop-box), or through UPS's customer counter;
- the package car driver brings the picked-up packages back to a local operating center;
- the packages are unloaded and placed on conveyor belts for sorters to separate them based on delivery location and the delivery time commitment;

- feeder vehicles and, in some cases, airplanes and trains take packages from the centralized hubs to other hubs for further sorting, and ultimately to local centers for delivery; and
- at the local center, packages are further sorted and loaded onto package cars for delivery based on each recipient's address.

(Meisel Decl. ¶ 12.)

***Response*: Admit.**

10.: UPS guarantees delivery at a time and date certain after a package has been picked up, and if a package is not timely delivered, UPS will, on request and subject to certain conditions, provide a full refund or credit of the shipping charges. (Meisel Decl. ¶ 15; Meisel Dep. at 271:24-272:15.)

***Response*: Admit.**

11.: In order to meet its delivery deadlines, UPS must avoid even minor delays. Delays or disruptions at any point in UPS's operations can affect thousands of packages in transit. For example, since no truck can leave an operating center until the sorting and loading process is completed, delays of just a few minutes in the sorting and loading can cause UPS to miss guaranteed delivery commitments for packages on every truck being loaded. (Meisel Decl. ¶ 16; Meisel Dep. at 79:1-10, 82:19-83:12, 186:20-21.)

***Response*: Qualified.** UPS's time projections for preloaders to complete their job is based upon historical data, which inherently includes delays associated with non-deliverable packages. *Meisel Dep.*, at 113:6-114:3. Further, UPS's time projections for drivers are also based on real

life historical data, which inherently includes various types of delays. *Meisel Dep.*, at 184:6-20. Finally, UPS's services can be delayed by a number of factors, including weather, fluctuating volume, equipment breakdown, employee absences, customer contact, waiting for elevators, and waiting to obtain signatures. *Meisel Dep.*, at 83:13-84:7; 184:21-185:9.

12.: For packages shipped in the United States, UPS shippers generally pack the parcel, and complete a shipping record that identifies the addressee, the weight of the package, and the number of packages. (Meisel Decl. ¶ 8; Meisel Dep. at 89:18-90:13.)

***Response*: Admit.**

13.: UPS shipping records and systems do not ask shippers from whom UPS picks up on a regular basis to identify the contents of packages traveling within the United States (except under special circumstances, such as where shippers indicate that their packages contain hazardous materials – as defined and required by the United States Department of Transportation). While UPS has the right to open and inspect packages in its system, in the normal course of business, this action generally happens infrequently, such as when there is reason to suspect some violation of our Hazardous Materials Compliance Program procedures might be occurring or it has information that the package(s) might otherwise present some risk to our employees, customers or the general public. (Meisel Decl. ¶ 8.)

***Response*: Deny.** The document that the customer prepares to ship a package provides a place to disclose the package's contents. *Butler Dep.*, at 79:17-20; *Meisel Dep.*, at 32:24-33:3.

14.: To comply with federal laws and/or UPS policy, UPS requires certain packages, such as those containing hazardous materials, to meet specific nationally-uniform identification (and other) requirements that do not vary by state of destination. (Meisel Decl. ¶ 13.)

***Response*: Admit.**

15.: Under its standard procedures, UPS preloaders do not have to search for or read text on a package in order to identify it as requiring special handling, except to the extent such text might appear on such a nationally-uniform identifying sticker. (Meisel Decl. ¶ 13.)

***Response*: Deny.** Preloaders inspect the packages for markings, and also to determine the delivery addresses. *Meisel Dep.*, at 54:7-17. Preloaders are trained to notice and segregate many types of non-deliverable packages, all of which require them to spend additional time with a particular package. *Meisel Dep.*, at 112:2-113:5.

16.: UPS's Terms and Conditions of Service require shippers to ensure that a shipment tendered to UPS does not violate any federal, state, provincial, or local laws or regulations applicable to the shipment. (Meisel Decl. ¶ 9; Meisel Dep. at 114:25-115:3.)

***Response*: Admit.**

17.: UPS does not permit shippers to transport alcoholic beverages to states that prohibit or restrict such transportation. UPS does not ordinarily make an independent determination about whether a shipper or addressee is licensed by a state. (Meisel Decl. ¶ 9; Meisel Dep. at 114:21-115:10.)

***Response*: Qualifed.** The UPS pickup driver would not know if it was legal to deliver alcohol in the destination state. *Meisel Dep.*, at 204:14-19. Instead, UPS would likely discover that the alcohol was non-deliverable in the destination state and either dispose of or return the package. *Meisel Dep.*, at 205:1-7.

18.: Because, in accordance with Section 1555-D, a person is deemed to know that a package marked in accordance with Section 1555-C(3)(B) contains tobacco products, in order to comply with Section 1555-D, UPS must take steps (1) to identify packages bound for delivery in Maine that are marked as containing tobacco products and (2) to ensure that such packages are not delivered in violation of Section 1555-D. (Meisel Decl. ¶ 17.)

***Response*: Admit.**

19.: Presently, and at all times since the Challenged Provisions were enacted, a marking made in accordance with Section 1555-C(3)(B) lawfully could appear on any of the six sides of a boxed package. 22 M.R.S.A. § 1555-C.

***Response*: Admit.**

20.: In order to identify packages bound for delivery in Maine that are marked in accordance with Section 1555-C(3)(B), as is necessary to comply with Section 1555-D, UPS instructs its preloaders (who load package cars for deliveries) to devote extra time to visually scan the six-sided exterior of every package to be delivered in Maine in order to determine if the shipper has marked the package with text indicating that the package contains tobacco products. (Meisel Decl. ¶ 18; Meisel Dep. at 105:25-106:20; Butler Dep. at 31:19-32:11, 94:15-95:2.)

***Response*: Qualified.** Preloaders are already inspecting packages for markings. *Meisel Dep.*, at 54:7-17.

21.: UPS preloaders would not ordinarily visually scan the six-sided exterior of packages to search for or read text that does not appear on a package's label (or a nationally-uniform identifying sticker). (Meisel Decl. ¶ 19; Meisel Dep. at 103:12-24.)

***Response*: Deny.** Preloaders inspect the packages for markings, and also to determine the delivery addresses. *Meisel Dep.*, at 54:7-17. Preloaders are trained to notice and segregate many types of non-deliverable packages, all of which require them to spend additional time with a particular package. *Meisel Dep.*, at 112:2-113:5.

22.: Not having to inspect or otherwise determine the contents of packages, or visually scan the six-sided exterior of packages to search for and read text, permits UPS to streamline package handling and avoid interruptions and delays. (Meisel Decl. ¶ 19; Meisel Dep. at 105:6-15.)

***Response*: Qualified.** Preloaders already do inspect packages for markings, to determine the delivery address, and to segregate many types of non-deliverable packages. *Meisel Dep.*, at 54:7-17; 112:2-113:5.

23.: UPS also instructs those preloaders to read the addressee's and shipper's names on the label of every package to be delivered in Maine to determine if the names suggest that the package may contain tobacco products. (Meisel Decl. ¶ 20.)

***Response*: Admit.**

24.: In the absence of the statutory requirements, preloaders normally would not have to read and consider a

shipper's name, and only occasionally would have to read a addressee's name. Having to read shipper and addressee names on every package adds delay to a preloader's tasks. (Meisel Decl. ¶ 20.)

***Response*: Qualified.** UPS has done no operational study to ascertain whether there is such a delay or, if so, the magnitude of that delay. *Butler Dep.*, at 5:18-7:17, 88:2-89:7 & Exhibit 8; *see also Meisel Dep.*, at 111:12-112:1.

25.: Determining whether a package is marked as containing a tobacco product in accordance with Section 1555-C(3)(B), and whether its shipper's or addressee's name indicates that the package likely contains tobacco products, materially adds to the processing and sorting time for all packages processed for delivery in Maine. (Meisel Decl. ¶ 21; Meisel Dep. at 108:5-23, 122:1-8; Butler Dep. at 31:19-32:11, 88:2-14.)

***Response*: Deny.** UPS has done no operational study to ascertain whether there is such a delay or, if so, the magnitude of that delay. *Butler Dep.*, at 5:18-7:17, 88:2-89:7 & Exhibit 8; *see also Meisel Dep.*, at 111:12-112:1.

26.: For every package that is bound for delivery in Maine and is marked as containing a tobacco product in accordance with Section 1555-C(3)(B), or that has a shipper or addressee name that indicates that the package likely contains tobacco products, UPS removes the package from the normal transportation and delivery procedures, to have its personnel research whether the addressee is licensed in Maine as a tobacco distributor or retailer. (Meisel Decl. ¶ 22; Meisel Dep. at 105:25-106:20; Butler Dep. at 94:9-95:2.)

***Response*: Admit.**

27.: There are more than 2,600 licensed tobacco retailers in Maine. (Meisel Decl. ¶ 23.)

***Response*: Admit.**

28.: There are approximately 40 licensed tobacco distributors in Maine. (Meisel Decl. ¶ 23.)

***Response*: Admit.**

29.: Determining whether the addressee of a tobacco products package is a licensed retailer or distributor materially adds to the processing and sorting time for such packages. (Meisel Decl. ¶ 24.)

***Response*: Deny.** Although UPS has not done any time studies, UPS estimates that it cost approximately $2.00 in personnel time for the ECS clerk to deal with each of those packages. *Meisel Dep.*, at 122:13-123:13. UPS had intercepted thirty-three (33) packages destined for a Maine consumer that UPS believed to contain tobacco products. *Butler Dep.*, at 52:16-17; *Meisel Dep.*, at 190:20-25. UPS does not know how many packages have been intercepted, researched, and determined to be deliverable. *Meisel Dep.*, at 192:21-25.

30.: If UPS determines that the addressee of such a tobacco products package is not licensed as a tobacco retailer or distributor in Maine, then UPS arranges to have the package returned to the shipper. (Meisel Dep. ¶ 25; Butler Dep. at 95:4-22.)

***Response*: Admit.**

31.: If the shipper of such a package is located in Maine but is not a licensed distributor or retailer, then a return-to-sender delivery itself would violate Section 1555-D. In

such circumstances, UPS has to contact the shipper and ask that the shipper retrieve the package from UPS, or failing that, to otherwise dispose of the package. (Meisel Decl. ¶ 25; Butler Dep. 95:4-22.)

***Response*: Admit.**

32.: Returning an undeliverable tobacco products package to its shipper, or otherwise arranging for its disposition materially adds to UPS's costs of handling such packages. (Meisel Decl. ¶ 26.)

***Response*: Deny.** Although UPS has not done any time studies, UPS estimates that it cost approximately $2.00 in personnel time for the ECS clerk to deal with each of those packages. *Meisel Dep.*, at 122:13-123:13. In addition, in the regular course of its business UPS does not charge an additional fee when it has to return a non-deliverable package to the shipper, as it is a set service that UPS offers in all of its fees. *George Dep.*, at 60:3-12.

33.: But for Section 1555-D, UPS would not have to use extra procedures to identify packages for Maine addressees containing tobacco products and to determine whether they can be delivered. (Meisel Decl. ¶ 27.)

***Response*: Admit.**

34.: Implementing procedures for dealing with packages marked as containing a tobacco product in accordance with Section 1555-C(3)(B), or otherwise indicated to contain tobacco products, requires that UPS provide special training to its preloaders and drivers in (1) performing six-sided visual scans, (2) recognizing packages marked or otherwise indicated to contain tobacco products, and (3) removing such packages from the sort for special handling. (Meisel Decl. ¶ 28; Meisel Dep. at 154:15-155:7.)

***Response*: Deny.** The training imposed no burden on UPS because it was given at a precommunication work meeting (PCM) at UPS business centers in Maine. *Butler Dep.*, at 49:15-23. Every morning, before each shift, UPS holds a PCM with its drivers and preloaders. *George Dep.*, at 53:8-14, & 54:3-4; *Butler Dep.*, at 48:6-10; *Meisel Dep.*, at 157:3-4, & 190:16-17. A PCM typically lasts three to five minutes. *George Dep.*, at 53:25-54:2; *Butler Dep.*, at 48:11-12.

35.: Implementing procedures for dealing with packages believed to contain a tobacco product requires that UPS provide special training to personnel assigned the task of researching whether the addressee of such packages is licensed as a tobacco distributor or retailer in Maine. (Meisel Decl. ¶ 28.)

***Response*: Deny.** The training imposed no burden on UPS because it was given at a precommunication work meeting (PCM) at UPS business centers in Maine. *Butler Dep.*, at 49:15-23. Every morning, before each shift, UPS holds a PCM with its drivers and preloaders. *George Dep* at 53:8-14, & 54:3-4; *Butler Dep.*, at 48:6-10; *Meisel Dep.*, at 157:3-4, & 190:16-17. A PCM typically lasts three to five minutes. *George Dep.*, at 53:25-54:2; *Butler Dep.*, at 48:11-12.

36.: But for Section 1555-D, carriers would not have to undertake any of the extra training set forth above. (Meisel Decl. ¶ 29.)

***Response*: Deny.** Every morning, before each shift, UPS holds a PCM with its drivers and preloaders. *George Dep.*, at 53:8-14, & 54:3-4; *Butler Dep.*, at 48:6-10; *Meisel Dep.*, at 157:3-4, & 190:16-17.

37.: Undertaking the specialized training set forth above increases UPS's cost of conducting business. (Meisel Decl. ¶ 29.)

***Response*: Deny.** Every morning, before each shift, UPS holds a PCM with its drivers and preloaders. *George Dep.*, at 53:8-14, & 54:3-4; *Butler Dep.*, at 48:6-10; *Meisel Dep.*, at 157:3-4, & 190:16-17.

38.: UPS offers shippers the opportunity to specify that designated shipments can only be delivered to an adult 21 years of age or older; this service is known as "Delivery Confirmation Adult Signature Required" ("DCASR"). (Meisel Decl. ¶ 30; Meisel Dep. at 175:3-14.)

***Response*: Admit.**

39.: UPS's shipper must request DCASR at the time of shipment, and must pay an additional fee, which is presently $2.75 (comprised of a $1.00 surcharge for delivery confirmation and a $1.75 additional charge for the adult signature requirement). (Meisel Decl. ¶ 30; Meisel Dep at 176:14-17; 179:12-14.)

***Response*: Qualified.** Kristin George testified that the fee was only $1.75. *George Dep.*, at 76:3-7; *Meisel Dep.*, at 176:14-17.

40.: In relevant part, the DCASR service is described in UPS's Terms and Conditions as follows:

> Delivery Confirmation Adult Signature Required – A shipper may request UPS to obtain the signature of an adult 21 years of age or older and to include it in the Delivery Confirmation response. An additional charge, set forth in the UPS Rates applicable to the shipment in effect at the time of shipping, will be assessed. UPS, in its sole discretion, will

> determine if delivery can be completed when such a request is made, and may request photo identification indicating the recipient's age, before completing delivery.

(Meisel Decl. ¶ 31; Meisel Dep. at 181:3-7.)

***Response*: Admit.**

41.: When a UPS shipper requests DCASR on a particular package, the fact that the shipper has requested this service typically is embedded in a "smart" label attached to the package i.e., a label that, when electronically scanned by a delivery employee, can convey embedded information or alerts. In general, shippers who use UPS-supplied or UPS-approved electronic shipping systems can generate and affix smart shipping labels to packages before they are tendered to UPS. At the time of delivery, the UPS service provider then receives a prompt on his or her DIAD device (the clipboard computer that drivers carry), which instructs the service provider to deliver only to an adult age 21 or older, and to obtain the signature of the adult who receives the package. (Meisel Decl. ¶ 32; Meisel Dep. at 58:2-19, 60:10-20, 182:20-22; Butler Dep. at 82:1-8.)

***Response*: Admit.**

42.: The UPS service provider may deliver a DCASR-designated package to, and obtain the confirmation signature from, any adult at the delivery address who is age 21 or older; the signature is not required to be from the named addressee. Thus, for example, when DCASR has been requested, UPS is free to deliver to, and obtain a confirming signature from, a mail room attendant or receptionist of appropriate age who is at the delivery

address. (Meisel Decl. ¶ 33; Meisel Dep. at 176:24-177:2, 183:5-7.)

***Response*: Admit.**

43.: Because UPS is free to deliver to any adult at the delivery address, UPS does not require that shippers who request the DCASR service provide UPS with the named addressee's actual age. (Meisel Decl. ¶ 33; Meisel Dep. at 172:23-173:7, 176:24-177:2, 183:13-15.)

***Response*: Admit.**

44.: In completing the delivery of a package on which DCASR has been requested, the UPS Service Provider does not necessarily obtain photo identification to confirm the age of the person accepting delivery. If the Service Provider in his or her discretion suspects that the person might be younger than 21, then he or she would request identification. (Meisel Decl. ¶ 34; Meisel Dep. at 182:5-14.)

***Response*: Admit.**

45.: Once the delivery has been completed, UPS sends the shipper a notice, in a printed or electronic format, confirming the delivery. (Meisel Decl. ¶ 35.)

***Response*: Admit.**

46.: Under Section 1555-C(3)(A), in connection with Maine-bound delivery sales of tobacco products, a tobacco retailer is required to provide to the delivery service the age of the purchaser. (Meisel Decl. ¶ 36.)

***Response*: Admit.**

47.: UPS uses standardized paper shipping forms and/or standardized electronic shipping systems to collect information about each shipment it carries, but does not include a field on its forms or in its systems in which the addressee's age could be recorded, and does not otherwise collect addressee age information from its shippers. (Meisel Decl. ¶ 37; Meisel Dep. at 165:17-21, 166:4-5, 167:9-10.)

***Response*: Qualified.** UPS changes its paper shipping forms generally once a year. *Meisel Dep.*, at 167:11-15. The forms are revised to reflect changes, such as new products or services or new rates. *Meisel Dep.*, at 167:20-168:7. UPS changes the fields in it computer system at least once a year to reflect the same types of changes. *Meisel Dep.*, at 167:16-168:7. UPS modifies its shipping systems a minimum of once a year, but potentially more often. *Meisel Dep.*, at 168:8-13. Those changes often include the addition of a data field. *Meisel Dep.*, at 169:5-9.

48.: In order to give shippers of Maine-bound, tobacco-product delivery sales the opportunity to identify the age of their purchasers/addressees in the most effective manner, UPS determined that it would have to revise its customer shipping systems and its standardized paper shipping forms used anywhere in the world for shipments to or within the United States to provide a field for the shipper to provide such information, and would have to modify, on a worldwide basis, the information systems that it uses to receive and process package information to provide for that additional field of data. (Meisel Decl. ¶ 38.)

***Response*: Qualified.** As a business decision, UPS elected to discontinue shipping tobacco products to consumers in Maine. *George Dep.*, at 78:3-16, 80:6-15, & Exhibit 20.

49.: Alternatively, UPS would have to devise another method of recording that information, such as by requiring shippers of Maine-bound tobacco product delivery sales to mark the addressee's age on the package at the same place where the package is marked as containing a tobacco product pursuant to Section 1555-C(3)(B). (Meisel Decl. ¶ 39.)

***Response*: Admit.**

50.: In accordance with Section 1555-C(3)(C), retailers of Maine-bound tobacco product delivery sales are required to utilize a delivery service that will require checking the identification of any addressee under the age of 27 before making delivery to ensure that the addressee is of legal age (at least 18) to receive tobacco products. (Meisel Decl. ¶ 40.)

***Response*: Admit.**

51.: UPS's Delivery Confirmation Adult Signature Required Service does not require checking the identification of any addressee under the age of 27 before making delivery. (Meisel Decl. ¶ 41.)

***Response*: Admit.**

52.: UPS's Delivery Confirmation Adult Signature Required Service does not allow deliveries to persons who are between the ages of 18 and 20. (Meisel Decl. ¶ 41.)

***Response:* Qualified.** By definition, UPS's DCASR Service also does not allow deliveries to persons under the age of 18. *Meisel Dep.*, at 173:4-7.

53.: In the UPS system, the best way to alert a delivery employee that an addressee identification check is required would be to embed such information in a smart shipping label. (Meisel Decl. ¶ 42.)

***Response:* Qualified.** Defendant admits that the use of a smart shipping label is one way to alert a delivery employee, but whether or not it is the "best" way is not a fact, but a conclusory opinion not requiring a response.

54.: In order to offer shippers the ability to generate smart labels reflecting the requirements of Section 1555-C(3)(C), all UPS-supplied and UPS-approved electronic shipping systems would have to be re-engineered to recognize and embed an alert for each package that (1) is bound for an address in Maine; (2) contains tobacco products as defined by the Maine statute; and (3) is bound to an addressee who is 18 to 26 years old. (Meisel Decl. ¶ 42.)

***Response*: Admit.**

55.: UPS also would have to re-engineer its DIAD devices and supporting information systems to read and recognize such an alert. (Meisel Decl. ¶ 42.)

***Response*: Admit.**

56.: In the absence of smart labels, if UPS required that shippers of tobacco products to Maine write the age of the addressee on the package at the same place where they mark the package as a tobacco product shipment pursuant to Section 1555-C(3)(B), or if UPS otherwise first learned that a package contained a tobacco product when preloaders

performed a six-sided visual scan and detected a marking made in accordance with Section 1555-C(3)(C), then UPS would have to devise a method for the employees who research the deliverability of such packages also to alert the delivery person to perform the identification check, such as by creating a special stamp or label to be affixed on approved packages. (Meisel Decl. ¶ 43.)

***Response*: Admit.**

57.: In accordance with Section 1555-C(3)(C)(1) and (2), retailers of Maine-bound tobacco product delivery sales are required to utilize a delivery service that will require that shipments of such packages be addressed to, and signed for personally by, the purchaser. (Meisel Decl. ¶ 44.)

***Response*: Admit.**

58.: UPS's Delivery Confirmation Adult Signature Required Service does not require personal delivery to, and confirming signature from, only the named addressee – as opposed to a mail room attendant, receptionist, or any other person at the delivery address or, upon request, to any adult at the delivery address. (Meisel Decl. ¶ 45; Meisel Dep. at 176:24-177:2, 183:5-7.)

***Response*: Admit.**

59.: Delivering a package exclusively to, and obtaining a delivery signature exclusively from, the named addressee considerably expands the amount of time that a delivery person must spend at a delivery stop. (Meisel Decl. ¶ 46; Meisel Dep. at 173:8-17, 174:7-13.)

***Response*: Deny.** UPS has not studied the cost or feasibility of providing a service that restricts delivery to a

particular person. *Meisel Dep.*, at 150:9 -151:2; 174:5-13; 187:2-12; 188:2-4; 196:3-11.

60.: Because Section 1555-C(3)(C) requires that a consumer who purchases a delivery-sale of tobacco products personally sign for the delivery, consumers who work outside the home during the typical work day (when carriers make their deliveries) will either have to direct those shipments to their workplace or make arrangements to be home at the anticipated time for the delivery. (Meisel Decl. ¶ 47.)

***Response*: Admit.**

61.: In most workplaces, a designated employee or type of employee typically is assigned the task of receiving cargo deliveries, such as a mail room attendant or receptionist. (Meisel Decl. ¶ 47.)

***Response*: Admit.**

62.: If UPS were making workplace deliveries of tobacco product delivery sales in Maine, it would not be able to deliver such a package to the designated employee who receives cargo deliveries, but instead would have to ask that person to contact the addressee and ask the addressee to come to the delivery area. (Meisel Decl. ¶ 47.)

***Response*: Admit.**

63.: In some workplaces, if UPS were making workplace deliveries of tobacco product delivery sales, the named addressee and the delivery could be located in different buildings, or on different floors of the same building. (Meisel Decl. ¶ 48.)

***Response*: Admit.**

64.: In some instances, if UPS were making workplace deliveries of tobacco product delivery sales, the addressee might be on the phone or have stepped away momentarily from his or her workstation or might otherwise be unavailable to come to the delivery area. (Meisel Decl. ¶ 48.)

***Response*: Admit.**

65.: In some instances, if UPS were making workplace deliveries of tobacco product delivery sales, it could take several minutes just to determine that the addressee is not even available to sign, in which case the process would have to be repeated the next day. (Meisel Decl. ¶ 48; Meisel Dep. at 174:7-13.)

***Response*: Admit.**

66.: Many classes of workers rarely (if ever) would be available to sign for such a package at a fixed address – such as truck drivers, police officers, construction workers, repair workers, and traveling sales representatives – and UPS might have to make repeated, futile attempts to deliver such packages to such people. (Meisel Decl. ¶ 48.)

***Response*: Admit.**

67.: If UPS were making deliveries of tobacco product delivery sales to a residence, the addressee may not be at home at the time that UPS's driver attempts the delivery, even if another adult is present at the residence. (Meisel Decl. ¶ 49.)

***Response*: Admit.**

68.: Attempting to deliver a package only to the named addressee could cause substantial delays on a delivery employee's delivery route, and thus threaten the timely

delivery of other packages on the employee's route. (Meisel Decl. ¶ 50.)

***Response*: Deny.** UPS has not studied the cost or feasibility of providing a service that restricts delivery to a particular person. *Meisel Dep.*, at 150:9 -151:2; 174:5-13; 187:2-12; 188:2-4; 196:3-11.

69.: In many cases, UPS likely would have to arrange to return packages containing delivery sales of tobacco products to the sender because they were unable to make delivery to the named addressee. (Meisel Decl. ¶ 50.)

***Response*: Deny.** UPS has not studied the cost or feasibility of providing a service that restricts delivery to a particular person. *Meisel Dep.*, at 150:9 -151:2; 174:5-13; 187:2-12; 188:2-4; 196:3-11.

70.: To impose a requirement on its shippers that Maine-bound packages containing delivery sales of tobacco products (1) be addressed to the purchaser and (2) be shipped only to purchasers of legal age to purchase tobacco products, UPS would have to alter, on a worldwide basis, its contractual and related documents that contain the terms and conditions of its service. (Meisel Decl. ¶ 51.)

***Response*: Admit.**

71.: To develop package delivery routes within a particular area, UPS conducts time studies to determine, on average, how long the driver will require at delivery stops and how long the driver will require between delivery stops. (Meisel Decl. ¶ 52; Meisel Dep. at 79:11-25.)

***Response*: Admit.**

72.: UPS relies on those time studies to create delivery routes in which, given known or expected package volumes,

drivers can complete all assigned package deliveries on their routes within the delivery deadlines for such packages. (Meisel Decl. ¶ 52.)

***Response*: Admit.**

73.: To increase efficiency, UPS relies on its time studies and historical data and puts drivers on the road only as required by the package volume for a particular day. (Meisel Decl. ¶ 52; Meisel Dep. at 186:2-5.)

***Response*: Admit.**

74.: The time required to complete a delivery stop that required delivery only to the named addressee (or to determine that such a delivery could not be completed) could vary widely – from a few seconds to several minutes – depending on the proximity and availability of the addressee at the time of delivery. (Meisel Decl. ¶ 52; Meisel Dep. at 196:2-11.)

***Response*: Deny.** UPS has not studied the cost or feasibility of providing a service that restricts delivery to a particular person. *Meisel Dep.*, at 150:9 -151:2; 174:5-13; 187:2-12; 188:2-4; 196:3-11.

75.: UPS determined that it is not practical for it to offer a service that guarantees delivery only to the named addressee because doing so would cause drivers to spend too much time per stop, would threaten on-time delivery of packages on a driver's route, and/or would force UPS to use more drivers per package, on modified routes, and thereby raise operating costs and prices. (Meisel Decl. ¶ 53; Meisel Dep. at 186:22-24, 187:2-13.)

***Response*: Deny.** UPS has not studied the cost or feasibility of providing a service that restricts delivery to a

particular person. *Meisel Dep.*, at 150:9 -151:2; 174:5-13; 187:2-12; 188:2-4; 196:3-11.

76.: If making personal deliveries of tobacco product delivery sales caused UPS drivers in Maine to have their workdays extended by one half hour, UPS would incur additional annual operating expenses of approximately $1.8 million – $60,000 annually for each additional workday minute. (Meisel Decl. ¶ 54; Meisel Dep. at 150:11-151:8, Ex. 9, 195:16-23.)

***Response*: Qualified.** The calculation means nothing, as it is only an order of magnitude, and is not tied to anything because UPS has not studied the feasibility or time requirements of providing personal deliveries. *Meisel Dep.*, at 195:7-196:11. Ms. Meisel testified that she just picked a number, with no science to back it up. *Meisel Dep.*, at 151:1-2.

77.: UPS examined how it could best comply with the Challenged Provisions' restrictions that (1) allow deliveries of tobacco products to persons other than licensed retailer or distributors, but only if the shipper of such a package is a licensed retailer, and (2) provide that a carrier is deemed to know that a package contains tobacco products if it is received from a person on the Attorney General's list of unlicensed tobacco retailers. (Meisel Decl. ¶ 55.)

***Response*: Deny.** UPS has not studied or analyzed the cost or time impact of providing such a service. *Meisel Dep.*, at 150:11-151:2; 174:5-13; 188:2-4; 195:7-196:11.

78.: To the extent that known unlicensed shippers were UPS account holders who receive daily pick-ups, UPS determined that the least disruptive way to recognize their packages that were transported to Maine for delivery

would be to specially process such shippers' packages at the point of origin into UPS's transportation system. (Meisel Decl. ¶ 56.)

***Response*: Deny.** UPS has not researched whether any of its regular shippers are on the list of known unlicensed tobacco retailers. *Meisel Dep.*, at 137:13-138:10. UPS has not altered its pick-up protocol in response to the Challenged Provisions. *Meisel Dep.*, at 139:1-4.

79.: Shippers on the Attorney General's list of known unlicensed shippers could contain retailers located in any of the 50 states, and could contain retailers located outside of the United States and, thus, could require that UPS institute such special procedures throughout its global operations, not just in Maine. (Meisel Decl. ¶ 56.)

***Response*: Deny.** The Challenged Provisions do not require UPS to institute special pick-up procedures. 22 M.R.S.A. §§ 1555-C, 1555-D.

80.: Known unlicensed shippers potentially could avoid UPS's special processing of their Maine-bound packages by introducing them to UPS's system through a storefront shipping outlet such as a Mail Boxes Etc. center. (Meisel Decl. ¶ 56.)

***Response*: Qualified.** Mail Boxes Etc. is now owned by UPS. *See* http://www.mbe.com/; and http://www.forbes.com/2001/03/05/0305ups.html. When a shipper without a UPS account tenders a package for shipment to an ASO, UPS identifies the ASO as the shipper, and has no other information about the person who initiated the shipment. *Butler Dep.*, at 101:17-102:5, 102:8-12, & 103:8-13; *Meisel Dep.*, at 76:8-16, 77:13-15, & 78:3-7. In such an instance, UPS could not be liable for knowingly delivering tobacco

products to a consumer in Maine because it is not receiving the package from a known unlicensed tobacco retailer. 22 M.R.S.A. § 1555-D.

81.: UPS concluded that the only way that UPS could ensure that it was not delivering packages in Maine from known unlicensed tobacco retailer would be to research every package to be delivered in Maine to determine if the shipper was on the list of known unlicensed shippers. (Meisel Decl. ¶ 57.)

***Response*: Deny.** UPS has not sized the impact of the procedures they have implemented to comply with the Maine law. *Meisel Dep.*, at 194:17-18. Further, UPS is not currently doing that research, yet appears to be complying with the provision of the law that prevents delivery of packages in Maine from known unlicensed tobacco retailers. *Meisel Dep.*, at 133:16-138:10.

82.: The time and effort required to conduct such research would have a tremendous adverse impact on UPS's operations, and would slow all UPS deliveries in Maine to a near standstill. (Meisel Decl. ¶ 57.)

***Response*: Deny.** UPS has not sized the impact of the procedures they have implemented to comply with the Maine law. *Meisel Dep.*, at 194:17-18. Further, UPS is not currently doing that research, yet appears to be complying with the provision of the law that prevents delivery of packages in Maine from known unlicensed tobacco retailers. *Meisel Dep.*, at 133:16-138:10

83.: UPS determined that, for at least three reasons, as of the effective date of the Challenged Provisions, it could no longer feasibly deliver tobacco products in Maine except to licensed retailers and distributors: (1) efforts to identify

all Maine-bound shipments from shippers on the list of known unlicensed shippers would be too disruptive of UPS operations in and outside of Maine, and would not always be effective; (2) UPS offered no service that met Section 1555-C's manner-of-delivery requirements for tobacco product delivery sales, so UPS could not lawfully be hired to make such deliveries to consumers and other unlicensed persons; and (3) UPS determined that it would be operationally impractical to implement new services and procedures that would comply with Section 1555-C's manner-of-delivery requirements because such services and procedures likely would be costly to design and implement, and likely would have been disruptive to UPS's Maine delivery operations. (Meisel Decl. ¶ 58; Meisel Dep. at 187:2-13.)

***Response*: Qualified.** Defendant admits that UPS does not currently provide a service that restricts delivery to the addressee. Defendant denies the remainder of the facts set forth herein. When asked how UPS determined it would not be practical to offer a service restricted delivery to the addressee, UPS's witness testified that she did not know, and that no feasibility studies were done. *Meisel Dep.*, at 186:15-188:12.

84.: In light of these extreme burdens, UPS concluded that the only possible way that it could make lawful deliveries of tobacco products to Maine would be to make deliveries only to licensed retailers and distributors and not to any other lawful addressee. (Meisel Decl. ¶ 58.)

***Response*: Deny.** When asked how UPS determined it would not be practical to offer a service restricted delivery to the addressee, UPS's witness testified that she did not know, and that no feasibility studies were done. *Meisel Dep.*, at 186:15-188:12.

85.: On September 10, 2003, UPS sent letters to its United States customers known or believed to be shippers of tobacco products, in which UPS notified them that, as of September 13, 2003, UPS would no longer accept any tobacco products shipments to the State of Maine except to recipients who are licensed tobacco distributors or retailers. (Meisel Decl. ¶ 59 & Ex. B; Meisel Dep. at 189:1-12; Butler Dep. at 23:19-24:6.)

***Response*: Admit.**

86.: UPS took steps to train its personnel in Maine – a total of approximately 600 employees – to comply with Section 1555-D and to reflect the change in UPS's policy regarding the delivery of tobacco products only to licensed retailers and distributors in the State of Maine. Specifically, UPS's training efforts consisted of the following steps:

- UPS made available to each of its operating centers in Maine lists of licensed tobacco retailers and licensed distributors in Maine, to whom packages containing tobacco products may lawfully be delivered;
- UPS disseminates updated lists of licensees to its operating centers in Maine, as updates become available;
- UPS instructed every operating center in Maine to establish procedures for all preloaders and drivers to ensure that they do not load or deliver packages containing tobacco products to unlicensed Maine addressees;
- On September 12, 2003, every business center in Maine dedicated its morning meeting with all preloaders and drivers of UPS delivery vehicles

(before the loading and delivery of packages to be delivered that day) to the new procedures for Maine tobacco products;

- At that meeting, preloaders and drivers were briefed on each business center's procedures for ensuring that no package containing tobacco products is delivered to unlicensed addressees in Maine. Specifically, preloaders and drivers were taught: (i) what constitutes a "tobacco product" under Maine law; (ii) how to identify packages that the preloader or driver knows or believes may contain tobacco products destined for addresses in Maine; (iii) how to determine whether a package containing tobacco products is destined for licensed addressee in Maine; and (iv) in the event that a package containing tobacco products is destined for an unlicensed addressee in Maine, to return the package for redelivery to the sender, to hold the package for pick-up by the sender or to destroy the package.

- To date, there have been two additional follow-up trainings for existing employees; in addition, such training is given to all new preloader and driver hires.

(Meisel Decl. ¶ 60; Meisel Dep. at 136:17-137:6, 156:16-21, 190:1-22 & Ex. 10; Butler Dep. at 31:14-32:24, 48:15-49:6, 54:25-55:18, 55:24-56:15, 80:16-18, 80:24-81:3, 93:9-95:22.)

***Response*: Qualified.** Every morning, before each shift, UPS holds a precommunication work meeting ("PCM") with its drivers and preloaders. *George Dep.*, at 53:8-14, & 54:3-4; *Butler Dep.*, at 48:6-10; *Meisel Dep.*, at 157:3-4, & 190:16-17.

87.: UPS adopted its policy of delivering packages containing tobacco products only to licensed addressees in

Maine to avoid the disruption and burden on UPS's operations caused by the Challenged Provisions, but UPS's policy has not eliminated such disruption and burden altogether. (Meisel Decl. ¶ 61; Meisel Dep. at 191:14-16.)

***Response*: Deny.** UPS has not sized the impact of the procedures they have implemented to comply with the Maine law. *Meisel Dep.*, at 194:17-18.

88.: UPS's compliance with Section 1555-D, through the operations procedures and training methods summarized above, continues to burden UPS with the costs and operational requirements involved in the following compliance efforts, among others: (i) maintaining and disseminating current lists of licensed addressees; (ii) training its personnel to follow the procedures UPS has enacted to comply with Section 1555-D; (iii) having preloaders and drivers identify packages that do or may contain tobacco products; (iv) having personnel research the addressees of such packages to determine whether the package may be delivered consistent with UPS's policy; and (v) returning or otherwise disposing of packages containing tobacco products that are destined for unlicensed addressees. (Meisel Decl. ¶ 62; Meisel Dep. at 105:19-108:23, 130:3-15, 135:1, 135:20-136:2, 192:3-16, 193:1-3; Butler Dep. at 49:12-50:9.)

***Response*: Deny.** UPS has not sized the impact of the procedures they have implemented to comply with the Maine law. *Meisel Dep.*, at 194:17-18.

89.: UPS has estimated that identifying packages that may contain tobacco products has added approximately two seconds to the processing time of each of the approximately 65,000 packages that UPS process for delivery in Maine each day, at a cost to UPS of approximately $12,000

per month. (Meisel Decl. ¶ 63; Meisel Dep. at 111:12-112:1, Ex. 7; Butler Dep. at 89:11-25, 91:13-92:1.)

***Response*: Qualified.** Mr. Butler did no operational study, and stated that he does not know how to specifically quantify the impact, and that "it's very hard to tell" how much it is. *Butler Dep.*, at 5:18-7:17, 88:2-89:7 & Exhibit 8; *see also Meisel Dep.*, at 111:12-112:1. Further, Mr. Butler was not listed or qualified as an expert witness.

90.: Based on established time studies for analogous look-up tasks, UPS estimates that, when packages are identified to contain tobacco products, it costs UPS approximately $2 per identified package to research whether the addressee is a licensed retailer or distributor. (Meisel Decl. ¶ 63; Meisel Dep. at 122:16-22, 126:6-25, 192:3-16.)

***Response*: Admit.**

91.: In addition to the costs UPS has incurred in the course of ensuring its compliance with Section 1555-D, UPS has lost revenue as a result of turning away business that it lawfully could deliver even after the Challenged Provisions became effective, namely, tobacco product shipments to Maine from retailers licensed by Maine. (Meisel Decl. ¶ 64.)

***Response*: Deny.** There is no evidence in the record that UPS has turned away business. UPS has actually increased its revenue. *George Dep.*, at 37:25-28:4. UPS has lost volume, but that is due to two customers choosing to ship through other carriers. *George Dep.*, at 13:5- 14:16. Ms. Meisel's Declaration directly contradicts her deposition testimony, in which she testified that she did not know whether UPS refused the business, or whether the shippers voluntarily began using the services of the postal

service. *Meisel Dep.*, 212:5-20. On those grounds, defendant respectfully moves to strike Fact No. 91.

* * *

DATED: August 30, 2004

Respectfully submitted,

G. STEVEN ROWE
Attorney General

PAUL STERN
Deputy Attorney General

/s/ Melissa R. O'Dea
MELISSA REYNOLDS O'DEA
Assistant Attorney General
Six State House Station
Augusta, ME 04333-0006
Tel. (207) 626-8800
Fax (207) 287-3145

CERTIFICATE OF SERVICE

I hereby certify that on the 30th day of August, 2004, I electronically filed a redacted version of this, *Defendant's Response to Plaintiffs' Statement of Undisputed Material Facts,* with the Clerk of Court, and caused to be delivered an unredacted version under seal with the Court and the parties. There are no non-registered parties requiring service by mail.

/s/ Melissa R. O'Dea
MELISSA REYNOLDS O'DEA

UNITED STATES DISTRICT COURT

FOR THE
DISTRICT OF MAINE

NEW HAMPSHIRE MOTOR TRANSPORT ASSOCIATION, MASSACHUSETTS MOTOR TRANSPORTATION ASSOCIATION, INC., AND VERMONT TRUCK & BUS ASSOCIATION, INC., Plaintiffs, v. G. STEVEN ROWE, in his official capacity as Attorney General for the State of Maine, Defendant.	CIVIL ACTION NO.: 03-CV-178-B-DBH

DEFENDANT'S STATEMENT OF UNDISPUTED MATERIAL FACTS IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

* * *

2. UPS employees visually scan the exterior of packages at many stages through the distribution process. *Meisel Dep.*, at 101:15-102:5 & 213:13-270:10; see also *Meisel Dep.*, Exhibit 13.

* * *

4. When a package enters the UPS system, the driver or the customer counter clerk visually scans the entire package – all six sides. *Meisel Dep.*, at 103:15-104:17.

9. When a driver picks up a package, he visually scans the package. *Meisel Dep.*, at 62:2-21, 68:11-18, 72:24-25, & 74:3.

* * *

11. The unloader visually inspects the package. *Meisel Dep.*, at 69:22-23.

* * *

22. The customer counter employees are instructed to visually inspect all six sides of the package to make sure that it is in good condition and also look for markings on the package. *Meisel Dep.*, at 31:5-7, & 15-20; *George Dep.*, at 70:3-10.

* * *

27. The sorter also is looking at packages to ensure that they are in good condition. *Meisel Dep.*, at 48:11-12.

* * *

29. Loaders are looking at packages to ensure that they are in good condition, and are also reading labels to confirm that they are being loaded into the proper trailer. *Meisel Dep.*, at 48:7-18.

30. Loaders also look for markings on the exterior of the package. *Meisel Dep.*, at 49:1-3.

* * *

37. Sorters visually inspect packages and their labels. *Butler Dep.*, at 35:9-12.

38. Sorters also identify potential problems with packages, including open packages, damaged packages or

packages with markings that may indicate hazardous materials. *Butler Dep.*, at 35:13-23; & 36:18-24.

* * *

47. The preloader inspects the package for markings, and also to determine the delivery address. *Meisel Dep.*, at 54:7-17.

48. Preloaders are trained to notice and segregate many types of non-deliverable packages, all of which require them to spend additional time with a particular package. *Meisel Dep.*, at 112:2-113:5.

* * *

51. UPS's time projections for drivers are also based on real life historical data, which inherently includes various types of delays. *Meisel Dep.*, at 184:6-20.

52. UPS's services can be delayed by a number of factors, including weather, fluctuating volume, equipment breakdown, employee absences, customer contact, waiting for elevators, and waiting to obtain signatures. *Meisel Dep.*, at 83:13-84:7; 184:21-185:9.

* * *

54. A UPS driver carries a hand-held computer called a digital information acquisition device, or DIAD. *Butler Dep.*, at 82:1-5; *Meisel Dep.*, at 58:1-3.

55. A DIAD captures data about a package and facilitates the record of delivery of a package. *Butler Dep.*, at 82:6-8.

56. This data includes the tracking number, the address that the package was addressed to, and may

include the address to which the package was actually delivered. *Meisel Dep.*, at 58:4-8.

57. Before delivering a package, at the point of delivery, a UPS driver scans the package's bar code with the DIAD. *George Dep.*, at 76:19-77:11; *Butler Dep.*, at 82:14-16:22-25; *Meisel Dep.*, at 59:10-22.

58. In addition, the driver keys additional information into the DIAD to indicate the address to which the package is being delivered, mating the bar code or the tracking number to the delivery address. *Butler Dep.*, at 82:15-19.

59. When a driver scans a package at the point of delivery, the DIAD generates different types of alerts. *Meisel Dep.*, at 59:23-25, & 61:8-11.

60. An alert is generated from an indicator that is embedded in the label and recognized by the DIAD. This type of label is referred to as a "smart label." *Meisel Dep.*, at 61:8-21.

* * *

62. One type of DIAD alert is an indication that a package was delivered later than the guaranteed delivery time. *Butler Dep.*, at 83:14-23; *Meisel Dep.*, at 60:2-10.

63. The DIAD also generates a prompt to obtain a signature if one is required before delivery. *Meisel Dep.*, at 60:10-20.

64. UPS has the capability, within the DIAD, to flag specific delivery addresses to generate an alert. *Meisel Dep.*, at 142:4-18.

65. UPS has the capability, within the DIAD, to flag specific consignees to generate an alert. *Meisel Dep.*, at 208:8-12.

* * *

69. The DIAD can be programmed to generate a prompt for a particular shipper to direct the driver's behavior. *Meisel Dep.*, at 208:22-209:24.

* * *

72. UPS offers a service called "delivery confirmation" for a fee of $1.00. *Meisel Dep.*, at 176:1-8.

73. UPS offers a service called "delivery confirmation, signature required" for a fee of $2.00. *Meisel Dep.*, at 176:9-13.

74. UPS offers a service called "delivery confirmation, adult signature required" ("DCASR") for a modest fee of either $1.75 or $2.75. *George Dep.*, at 76:3-7; *Meisel Dep.*, at 176:14-17.

75. When a driver attempts to deliver a package that has been shipped using DCASR, that driver receives a prompt on his DIAD to verify that the person receiving the package is 21 years of age. *George Dep.*, at 76:14-77:11.

76. To verify age, the driver would typically ask to see a form of identification. *George Dep.*, at 76:14-18.

77. When delivering a package with DCASR, a driver uses his instinct to decide whether to obtain identification verifying age. *Meisel Dep.*, at 182:2-14.

78. DCASR is priced profitably. *Meisel Dep.*, at 179:15-25.

79. If UPS discovers that one of its products is not profitable, it will adjust the price it charges for that product. *Meisel Dep.*, at 180:1-8.

80. UPS may lose money on particular packages, but the products are priced so that they are profitable on average. *Meisel Dep.*, at 180:17-181:2.

81. When UPS is unable to deliver a package on the first attempt, UPS makes two additional attempts to deliver the package. *Butler Dep.*, at 86:7-11.

* * *

86. UPS does not charge an additional fee when it has to return a non-deliverable package to the shipper. *George Dep.*, at 60:3-12.

* * *

101. On September 10, 2003 UPS sent a letter to certain customers informing those shippers that, in response to the Challenged Provisions, UPS has elected to discontinue shipping tobacco products to consumers in Maine. *George Dep.*, at 78:3-16, 80:6-15, & Exhibit 20.

102. The customers who received this letter were selected by their "SIC Code", which is a universal marketing code companies use to classify the type of commodity that a company manufactures or ships. *George Dep.*, at 81:1-9; *Meisel Dep.*, at 272:16-22.

103. By using an "SIC Code", UPS was able to pull up a list of its customers who sell tobacco. *George Dep.*, at 81:15-20; *Meisel Dep.*, at 272:23-273:19.

* * *

105. UPS decided to create a procedure to intercept Maine-bound packages containing tobacco focused on the preload position, because preloaders have more time to look at packages than sorters and unloaders do. *Butler Dep.*, at 54:10-20; *Meisel Dep.*, at 109:2-17.

106. Every morning, before each shift, UPS holds a precommunication work meeting ("PCM") with its drivers and preloaders. *George Dep.*, at 53:8-14, & 54:3-4; *Butler Dep.*, at 48:6-10; *Meisel Dep.*, at 157:3-4, & 190:16-17.

107. A PCM typically lasts three to five minutes. *George Dep.*, at 53:25-54:2; *Butler Dep.*, at 48:11-12.

108. On September 12, 2003, at a regularly scheduled PCM at UPS business centers in Maine information was provided regarding the delivery of tobacco products. *Butler Dep.*, at 49:15-23.

109. Preloaders and drivers were told to look for markings that indicated tobacco products were contained in a package. *George Dep.*, at 55:4-12, & 56:4-14.

110. UPS requires its preloaders in Maine to look at packages for evidence of tobacco. *Butler Dep.*, at 88:2-7; *Meisel Dep.*, at 106:1-13, & 107:8-13.

111. Although unable to specifically quantify how much additional time a preloader in Maine must spend scanning packages, John Butler, a sales manager for UPS,, opined that he thinks it takes a preloader an additional 56 one hundred-thousandths of an hour, or two seconds per package. Mr. Butler did no operational study, and stated that he does not know how to specifically quantify the impact, and that "it's very hard to tell" how much it is. *Butler Dep.*, at 5:18-7:17, 88:2-89:7 & Exhibit 8; *see also Meisel Dep.*, at 111:12-112:1.

112. Drivers were also told to notice indicia of tobacco on packages, and refrain from delivering any such package. *Meisel Dep.*, at 106:15-20.

113. The driver looks at the package for obvious markings and reads the label. *Meisel Dep.*, at 124:1-12.

114. UPS has done no study or analysis to determine whether a driver spends any additional time looking at Maine bound packages. *Meisel Dep.*, at 148:15-19; 149:9-10.

115. Preloaders and drivers were also told to give any packages they found to the ECS clerk. *George Dep.*, at 57& Exhibit 14.

116. The same PCM was repeated at UPS business centers in Maine in January 2004 and in June 2004. *Butler Dep.*, at 49:2-6.

117. There was no training provided beyond the PCM. *George Dep.*, at 56:13-14; *Meisel Dep.*, at 154:12-155:7; 159:3-6; 160:8-161:1.

118. Other than what was instructed during the PCM, UPS has not created any process to identify and specially handle packages that contain cigarettes. *George Dep.*, at 67:9-14.

119. UPS's gross revenue in 2003 was $33.5 billion. *Meisel Dep.*, at 201:7-10.

* * *

121. UPS has over 4,000 employees in the technology and information systems area. *Meisel Dep.*, at 168:17-20; 202:2-5.

* * *

126. UPS had intercepted thirty-three (33) packages destined for a Maine consumer that UPS believed to contain tobacco products. *Butler Dep.*, at 52:16-17; *Meisel Dep.*, at 190:20-25.

* * *

128. Although UPS has not done any time studies, UPS estimates that it cost approximately $2.00 in personnel time for the ECS clerk to deal with each of those packages. *Meisel Dep.*, at 122:13-123:13.

* * *

133. UPS has not done any studies to determine the effect of the Challenged Provisions on that rate. *Meisel Dep.*, at 153:14-21.

134. The State provides UPS with an electronic version of its list of known unlicensed tobacco retailers who may be attempting to unlawfully ship tobacco to Maine consumers. *Meisel Dep.*, at 134:16-136:5.

135. UPS has not researched whether any of its regular shippers are on the list of known unlicensed tobacco retailers. *Meisel Dep.*, at 137:13-138:10.

* * *

141. From a systems perspective, UPS is capable of doing pretty much anything, including providing that service. *Meisel Dep.*, at 274:12-275:10.

142. UPS changes its paper shipping forms generally once a year. *Meisel Dep.*, at 167:11-15.

143. The forms are revised to reflect changes, such as new products or services or new rates. *Meisel Dep.*, at 167:20-168:7.

144. UPS changes the fields in it computer system at least once a year to reflect the same types of changes. *Meisel Dep.*, at 167:16-168:7.

145. UPS modifies its shipping systems a minimum of once a year, but potentially more often. *Meisel Dep.*, at 168:8-13.

146. Those changes often include the addition of a data field. *Meisel Dep.*, at 169:5-9.

147. UPS has not sized the impact of the procedures they have implemented to comply with the Maine law. *Meisel Dep.*, at 194:17-18.

148. UPS has not made any changes to its information systems to comply with the Challenged Provisions. *Meisel Dep.*, at 202:13-18.

149. UPS has implemented written procedures and policies relating to the delivery of alcohol. *George Dep.*, at 86:3-6.

150. Drivers are trained to handle packages containing alcohol. *Meisel Dep.*, at 204:7-205:7.

151. UPS holds PCMs regarding the transportation of alcohol. *Meisel Dep.*, at 205:8-11.

152. UPS has implemented written procedures and policies relating to the delivery of handguns. *George Dep.*, at 95:1-5; *Butler Dep.*, at 78:12-23.

153. Shippers of handguns verbally inform the pick-up driver of the package's contents, and are prohibited from marking the package in any way. *Meisel Dep.*, at 92:3-13.

154. Packages containing firearms are segregated from other packages. *Meisel Dep.*, at 92:23-93:1.

155. Firearms must be shipped using next day air and require an adult signature. *Meisel Dep.*, at 93:1-5.

156. UPS employees are trained to handle packages containing firearms. *Meisel Dep.*, at 205:24-206:10.

* * *

160. Based upon this figure, Butler opined that for the five month period from September of 2003 through January of 2004, it cost UPS an additional $62,653.24 to deliver 6,936,193 packages in Maine due to the Challenged Provisions. *Butler Dep.*, at Exhibit 8.

161. Using the figures in the prior paragraph, if correct, the Challenged Provisions cost UPS an additional $ 0.009 (or less than 1 cent) per package. [This figure is calculated by dividing the additional $62,653.24 in costs by the 6,936,193 packages delivered in Maine.]

* * *

DATED: August 9, 2004 Respectfully submitted,

G. STEVEN ROWE
Attorney General

PAUL STERN
Deputy Attorney General

/s/ MELISSA REYNOLDS O'DEA
Assistant Attorney General
Six State House Station
Augusta, ME 04333-0006
Tel. (207) 626-8800
Fax (207) 287-3145

CERTIFICATE OF SERVICE

I hereby certify that on the 9th day of August, 2004, I electronically filed a redacted version of this, *Defendant's Statement of Undisputed Material Fact in Support of Motion for Summary Judgment*, with the Clerk of Court, and caused to be delivered an unredacted version under seal with the Court and the parties. There are no non-registered parties requiring service by mail.

/s/ MELISSA REYNOLDS O'DEA

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MAINE

NEW HAMPSHIRE MOTOR TRANSPORT ASSOCIATION, MASSACHUSETTS MOTOR TRANSPORTATION ASSOCIATION, INC., AND VERMONT TRUCK & BUS ASSOCIATION, INC., Plaintiffs, -v- G. STEVEN ROWE, in his official capacity as Attorney General of the State of Maine, Defendant.	Case No: 1:03-cv-178-DBH

PLAINTIFFS' OPPOSITION TO DEFENDANT'S STATEMENT OF UNDISPUTED MATERIAL FACTS IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT, INCLUDING PLAINTIFFS' ADDITIONAL UNDISPUTED MATERIAL FACTS

* * *

PLAINTIFFS' RESPONSE TO DEFENDANT'S UNDISPUTED MATERIAL FACTS

* * *

2. Qualified. Defendant's Undisputed Material Fact No. 2 (that "UPS employees visually scan the exterior of packages at many stages through the distribution process") is misleading to the extent that it implies that such UPS employees' scanning includes searching for and reading text that does not appear on a package's label. (*See* Meisel Dep. 232:18-233:3.[2])

* * *

4. Disputed. The cited evidence does not support Defendant's Undisputed Material Fact No. 4 (that "[w]hen a package enters the UPS system, the driver or the customer counter clerk visually scans the entire package – all six sides"). Indeed, the cited deposition testimony states, "That doesn't mean they have to look at all six sides to see what it is they need to see." (Meisel Dep. at 103:22-24.)

* * *

9. Qualified. Defendant's Undisputed Material Fact No. 9 (that "[w]hen a driver picks up a package, he visually scans the package") is misleading to the extent that it implies that UPS drivers' scanning includes searching for and reading text that does not appear on a package's label. (Meisel Dep. at 232:18-233:3.)

* * *

11. Qualified. Defendant's Undisputed Material Fact No. 11 (that "[t]he unloader visually inspects the package") is misleading to the extent that it implies that UPS unloaders' scanning includes searching for and reading text that does not appear on a package's label. (*See* Meisel Dep. at 232:18-233:3.)

* * *

[2] The deposition pages cited throughout Plaintiffs' Opposition to Defendant's Statement of Undisputed Material Facts in Support of Motion for Summary Judgment were attached to Defendant's Discovery Citation in Support of Defendant's Motion for Summary Judgment, lodged with this Court on August 9, 2004.

22. Qualified. The evidence in the record does not support Defendant's Undisputed Material Fact No. 22 (that "[t]he customer counter employees are instructed to visually inspect all six sides of the package to make sure that it is in good condition and also look for markings on the package) because it is qualified by the testimony that UPS employees do not necessarily "look at all six sides to see what it is they need to see." (Meisel Dep. at 103:21-24.) In addition, the asserted fact is misleading to the extent that it implies that such UPS employees' scanning includes searching for and reading text that does not appear on a package's label. (*See* Meisel Dep. 232:18-233:3.)

* * *

27. Undisputed.

* * *

29. Undisputed.

30. Qualified. Defendant's Undisputed Material Fact No. 30 (that "[l]oaders also look for markings on the exterior of the package) is misleading to the extent that it implies that such loaders' scanning includes searching for and reading text that does not appear on a package's label. (*See* Meisel Dep. 232:18-233:3.) Moreover, the cited deposition testimony states that loaders "may look" for markings on the exterior of the package. (*See* Meisel Dep. at 49:1-3.)

* * *

37. Qualified, to the extent that Defendant's Undisputed Material Fact No. 37 (that "[s]orters visually inspect packages and their labels") implies that sorters' visual inspection of packages includes searching for and reading text that does not appear on a package's label. (*See* Meisel Dep. 232:18-233:3.)

38. Undisputed.

* * *

47. Qualified. Defendant's Undisputed Material Fact No. 47 (that "[t]he preloader inspects the package for markings, and also to determine the delivery address) is misleading to the extent that it implies that preloaders' inspection of packages includes searching for and reading text that does not appear on a package's label, which is only the case in Maine. (*See* Meisel Dep. 232:18-233:3.)

48. Undisputed.

* * *

51. Undisputed.

52. Undisputed.

* * *

54. Qualified. Defendant's Undisputed Material Fact No. 54's (that "[a] UPS driver carries a hand-held computer called a digital information acquisition device, or DIAD") reference to "DIAD" actually stands for "*Delivery* Information Acquisition Device." (Meisel Dep. at 57:25-58:3.)

55. Undisputed.

56. Undisputed.

57. Undisputed.

58. Undisputed.

59. Undisputed.

60. Undisputed.

* * *

62. Undisputed.

63. Undisputed.

64. Undisputed.

65. Undisputed.

* * *

69. Undisputed.

* * *

72. Undisputed.

73. Undisputed.

74. Qualified. The cited deposition testimony in support of Defendant's Undisputed Material Fact No. 74 (that "UPS offers a service called 'delivery confirmation, adult signature required' ('DCASR') for a modest fee of either $1.75 or $2.75") does not characterize the fee as "modest." The correct fee for this service is $2.75. (*See* George Dep. at 76:3-7; Meisel Dep. at 176:14-17.)

75. Undisputed.

76. Undisputed.

77. Undisputed.

78. Qualified. The cited deposition testimony in support of Defendant's Undisputed Material Fact No. 78 (that "DCASR is priced profitably") states that the deponent believed that DCASR was priced profitably, and it was UPS's intent for it to be priced profitably. (*See* Meisel Dep. at 179:15-25.)

79. Undisputed.

80. Undisputed.

81. Undisputed.

* * *

86. Undisputed.

* * *

101. Qualified. The cited deposition testimony and exhibit in support of Defendant's Undisputed Material Fact No. 101 (that "[o]n September 10, 2003 UPS sent a letter to certain customers informing those shippers that, in response to the Challenged Provisions, UPS has elected to discontinue shipping tobacco products to consumers in Maine") do not characterize UPS's decision as an "election."

102. Undisputed.

103. Undisputed.

* * *

105. Undisputed.

106. Undisputed.

107. Undisputed.

108. Undisputed.

109. Undisputed, though not supported by the cited evidence.

110. Undisputed.

111. Disputed. Defendant's Undisputed Material Fact No. 111 (that "[a]lthough unable to specifically

quantify how much additional time a preloader in Maine must spend scanning packages, John Butler, a sales manager for UPS, opined that he thinks it takes a preloader an additional 56 one hundred-thousandths of an hour, or two seconds per package. Mr. Butler did no operational study, and stated that he does not know how to specifically quantify the impact, and that 'it's very hard to tell' how much it is") is inaccurate. First, to the extent that it states that "Mr. Butler did no operational study," the fact is contrary to the cited deposition testimony of Mr. Butler, which states that he "evaluated how long it would take someone to read a label thoroughly above and beyond the normal quick evaluation of what needs to be done."

Second, to the extent that it states that Mr. Butler was "unable to specifically quantify how much additional time" it takes a preloader in Maine to perform a tobacco indicator check, the fact is incorrect because Mr. Butler's analysis *did* quantify this figure as 56 one hundred-thousandths of an hour based on established UPS benchmark time studies. The cited deposition testimony of Mr. Butler states that he could not quantify the time by which the Challenged Provisions "slowed down the processing of preload packages."

112. Undisputed.

113. Undisputed.

114. Qualified. Defendant's Undisputed Material Fact No. 114 (that "UPS has done no study or analysis to determine *whether* a driver spends any additional time looking at Maine bound packages") is inaccurate in that the cited testimony indicates that UPS has not specifically quantified *how much* additional time drivers spend. In addition, the record reflects that UPS has analyzed and

determined that drivers would spend additional time delivering packages personally to the named addressee, as required by one of the Challenged Provisions, and has quantified the cost that it would incur by adding even a minute to each Maine drivers' day. (*See* Meisel Dep. at 149:8-151:8.)

115. Undisputed.

116. Undisputed.

117. Disputed. Defendant's Undisputed Material Fact No. 117 (that "[t]here was no training provided beyond the PCM") overlooks training to personnel assigned the task of researching whether the addressee of such packages is licensed as a tobacco distributor or retailer in Maine. (*See* Pls.' SMF 135.)

118. Undisputed.

119. Undisputed.

* * *

121. Undisputed.

* * *

126. Qualified. Defendant's Undisputed Material Fact No. 126 (that "UPS had intercepted thirty-three (33) packages destined for a Maine consumer that UPS believed to contain tobacco products") is qualified as follows: from all of the packages that UPS employees segregated as potentially containing tobacco products, thirty-three packages were withheld and not delivered to their intended recipients.

* * *

128. Qualified. Defendant's Undisputed Material Fact No. 128 (that "[a]lthough UPS has not done any time studies, UPS estimates that it cost approximately $2.00 in personnel time for the ECS clerk to deal with each of those packages") is qualified as follows: UPS estimates that it cost approximately $2.00 in personnel time for the ECS clerk to research packages in Maine indicated to contain tobacco products, based on time studies of analogous tasks.

* * *

133. Undisputed.

134. Undisputed.

135. Undisputed.

* * *

141. Qualified. The cited deposition testimony qualifies Defendant's Undisputed Material Fact No. 141 (that "[f]rom a systems perspective, UPS is capable of doing pretty much anything, including providing that service") with the word "probably." UPS objects to this fact to the extent that it implies UPS can do anything cost-effectively.

142. Undisputed.

143. Undisputed.

144. Undisputed.

145. Undisputed.

146. Undisputed.

147. Qualified. Defendant's Undisputed Material Fact No. 147 (that "UPS has not sized the impact of the

procedures they have implemented to comply with the Maine law") is qualified as follows: UPS has estimated the impact of the procedures they have implemented to comply with the Challenged Provisions, based on known benchmarks for analogous activities.

148. Undisputed.

149. Undisputed.

150. Undisputed.

151. Undisputed.

152. Undisputed.

153. Undisputed.

154. Undisputed.

155. Undisputed.

156. Undisputed.

* * *

160. Qualified. The figure represented in Defendant's Undisputed Material Fact No. 160 (that "[b]ased upon this figure, Butler opined that for the five month period from September of 2003 through January of 2004, it cost UPS an additional $62,653.24 to deliver 6,936,193 packages in Maine due to the Challenged Provisions") applies to identifying packages marked to contain tobacco. Once packages are so identified, UPS incurs an approximate cost of $2 per package to research whether they can be delivered.

161. Undisputed.

* * *

Respectfully submitted.

PAUL T. FRIEDMAN
RUTH N. BORENSTEIN
LAWRENCE R. KATZIN
MORRISON & FOERSTER LLP
425 Market Street
San Francisco, CA 94105-2482
Telephone: (415) 268-7000

MICHAEL A. NELSON
JENSEN BAIRD GARDNER & HENRY
10 Free Street
P.O. Box 4510
Portland, ME 04112-4510
Telephone: (207) 775-7271

By: /s/ Michael A. Nelson
Michael A. Nelson

Attorneys for Plaintiffs
NEW HAMPSHIRE MOTOR TRANSPORT ASSOCIATION, MASSACHUSETTS MOTOR TRANSPORTATION ASSOCIATION INC., and VERMONT TRUCK & BUS ASSOCIATION, INC.

CERTIFICATE OF SERVICE

I, Michael A. Nelson, hereby certify that on August 30, 2004 I electronically filed a redacted version of **PLAINTIFFS' OPPOSITION TO DEFENDANT'S STATEMENT OF UNDISPUTED MATERIAL FACTS IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT, INCLUDING PLAINTIFFS' ADDITIONAL UNDISPUTED MATERIAL FACTS** with the Clerk of Court. An unredacted version was transmitted to the

Court today by Hand Delivery, and to Defendant's counsel by electronic mail. There are no non-registered parties requiring service by first-class United States mail.

Dated at Portland, Maine this 30th day of August 2004.

PAUL T. FRIEDMAN
RUTH N. BORENSTEIN
LAWRENCE R. KATZIN
MORRISON & FOERSTER LLP
425 Market Street
San Francisco, CA 94105-2482
Telephone: (415) 268-7000

MICHAEL A. NELSON
JENSEN BAIRD GARDNER & HENRY
10 Free Street, P.O. Box 4510
Portland, ME 04112-4510
Telephone: (207) 775-7271

By: /s/ Michael A. Nelson

Attorneys for Plaintiffs
NEW HAMPSHIRE MOTOR TRANSPORT ASSOCIATION, MASSACHUSETTS MOTOR TRANSPORTATION ASSOCIATION INC., and VERMONT TRUCK & BUS ASSOCIATION, INC.

UNITED STATES DISTRICT COURT

FOR THE
DISTRICT OF MAINE

NEW HAMPSHIRE MOTOR TRANSPORT ASSOCIATION, MASSACHUSETTS MOTOR TRANSPORTATION ASSOCIATION, INC., AND VERMONT TRUCK & BUS ASSOCIATION, INC., Plaintiffs, v. G. STEVEN ROWE, in his official capacity as Attorney General for the State of Maine, Defendant.	CIVIL ACTION NO.: 03-CV-178-B-DBH

DEFENDANT'S RESPONSE TO PLAINTIFFS' ADDITIONAL MATERIAL FACTS

Pursuant to Fed. R. Civ. P. 56 and Local Rule 56(c), defendant, Maine Attorney General G. Steven Rowe, hereby responds to each additional fact set forth in plaintiff's opposition to defendant's statement of undisputed material facts in support of motion for summary judgment. In responding to plaintiff's additional facts, defendant, by admitting, denying or qualifying the facts, does not concede that any of the facts are material.

Response to Plaintiff's Additional Undisputed Material Facts

First, plaintiffs attempt to summarize the undisputed material facts submitted in support of their motion for summary judgment. Defendant has already responded to each of those facts in Defendant's Opposing Statement of Material Facts filed on August 30, 2004 in support of Defendant's Opposition to Plaintiffs' Motion for Summary Judgment. Defendant incorporates by reference those responses as if fully set forth herein.

166.: The DIAD can recognize account numbers of shippers who have a UPS account; it cannot read shipper names. (*See* Meisel Dep. at 208:13-209:2.)

***Response*: Admit.**

DATED: September 14, 2004

Respectfully submitted,

G. STEVEN ROWE
Attorney General

PAUL STERN
Deputy Attorney General

/s/ MELISSA REYNOLDS O'DEA
Assistant Attorney General
Six State House Station
Augusta, ME 04333-0006
Tel. (207) 626-8800
Fax (207) 287-3145

CERTIFICATE OF SERVICE

I hereby certify that on the 14th day of September, 2004, I electronically filed a redacted version of this, *Defendant's Response to Plaintiffs' Additional Material Facts*, with the Clerk of Court, and caused to be delivered an unredacted version under seal with the Court and the parties. There are no non-registered parties requiring service by mail.

/s/ MELISSA REYNOLDS O'DEA

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MAINE

NEW HAMPSHIRE MOTOR TRANSPORT ASSOCIATION, MASSACHUSETTS MOTOR TRANSPORTATION ASSOCIATION, INC., AND VERMONT TRUCK & BUS ASSOCIATION, INC., Plaintiffs, -v- G. STEVEN ROWE, in his official capacity as Attorney General of the State of Maine, Defendant.	Case No. 1:03-cv-178-DBH

SECOND AMENDED JUDGMENT

JUDGMENT is hereby entered for the plaintiffs, New Hampshire Motor Transport Association, Massachusetts Motor Transportation Association, Inc., and Vermont Truck & Bus Association, Inc., and against the defendant, the Maine Attorney General, on the plaintiffs' claim that the Federal Aviation Administration Authorization Act of 1994 preempts 22 M.R.S.A. § 1555-C(3) in its entirety. The Maine Attorney General is enjoined from enforcing 22 M.R.S.A. § 1555-C(3)(C).

FURTHER, JUDGMENT is hereby entered for the plaintiffs, and against the defendant, on plaintiffs' claim that the Federal Aviation Administration Authorization Act of 1994 preempts enforcement of so much of 22

M.R.S.A. § 1555-D as imposes constructive or imputed knowledge that a carrier has delivered a tobacco product if the package containing the product is marked as containing tobacco as required by 22 M.R.S.A. § 1555-C(3)(B) or if the seller's name appears on the Attorney General's list maintained pursuant to 22 M.R.S.A. § 1555-D(1). the Maine Attorney General is enjoined from enforcing so much of 22 M.R.S.A. § 1555-D as imposes constructive or imputed knowledge that a carrier has delivered a tobacco product if the package containing the product is marked as containing tobacco as required by 22 M.R.S.A. § 1555-C(3)(B) or if the seller's name appears on the Attorney General's list maintained pursuant to 22 M.R.S.A. § 1555-D(1), against any motor carrier, air carrier, or carrier affiliated with a direct air carrier through common controlling ownership when such carrier is transporting property by aircraft or by motor vehicle (whether or not such property has had or will have a prior or subsequent air movement) (as those terms are used in 49 U.S.C. § 14501(c)(1) and 49 U.S.C. § 41713(b)(4)).

FURTHER, JUDGMENT is hereby entered for the defendant and against the plaintiffs on the plaintiffs' claim that the Federal Aviation Administration Authorization Act of 1994 preempts so much of 22 M.R.S.A. § 1555-D as bans the knowing delivery of contraband tobacco by carriers, except as set forth in the preceding paragraph of this judgment.

FURTHER, JUDGMENT is hereby entered for the defendant, and against the plaintiffs on the plaintiffs' claims that the Federal Aviation Administration Authorization Act of 1994 preempts 22 M.R.S.A. § 1555-C(3)(A).

WILLIAM S. BROWNELL
Clerk of Court

/s/ Melody Whitten
By: Melody Whitten
Deputy Clerk

Dated this 29th day of June, 2006

758 B

No. 06-457

FILED
OCT 11 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The

Supreme Court of the United States

G. STEVEN ROWE, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF THE STATE OF MAINE,

Petitioner,

v.

NEW HAMPSHIRE MOTOR TRANSPORT ASSOCIATION, MASSACHUSETTS MOTOR TRANSPORTATION ASSOCIATION, INC., AND VERMONT TRUCK & BUS ASSOCIATION, INC.

On Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

BRIEF OF RESPONDENTS

PAUL T. FRIEDMAN
RUTH N. BORENSTEIN
LAWRENCE R. KATZIN
MORRISON & FOERSTER LLP
425 Market Street
San Francisco, CA 94105-2482

BETH S. BRINKMANN
Counsel of Record
BRIAN R. MATSUI
MORRISON & FOERSTER LLP
2000 Pennsylvania Avenue, NW
Washington, DC 20006-1888
(202) 887-1544

Counsel for Respondents

October 11, 2007

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Whether provisions of the Maine Tobacco Delivery Law that regulate whether and how cargo carriers may provide transportation and delivery services for shipments of tobacco products are "law[s] related to a price, route, or service" of such carriers and, therefore, are preempted by the Federal Aviation Administration Authorization Act of 1994 (FAAAA), 49 U.S.C. §§ 14501(c)(1) & 41713(b)(4)(A).

PARTIES TO THE PROCEEDING

The parties to the proceeding are listed in the caption.

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

None of the respondents, the New Hampshire Motor Transport Association, the Massachusetts Motor Transportation Association, Inc., or the Vermont Truck & Bus Association, Inc., has a parent corporation and no publicly held company owns 10% or more of the stock of any of the respondents.

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CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

The Supremacy Clause of the United States Constitution provides in relevant part:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof * * * shall be the supreme Law of the land, * * * any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Relevant portions of the Federal Aviation Administration Authorization Act of 1994 (FAAAA) and the Airline Deregulation Act, 49 U.S.C. §§ 14501 and 41713, and the Maine Tobacco Delivery law are set forth at App., *infra*, 1a-14a.

INTRODUCTION

Each year, commercial motor and air carriers move *billions* of packages, worth more than $6 trillion, in interstate and intrastate commerce. Every segment of our economy depends on commercial carriers' reliable transportation and delivery services to deliver packages that have unyielding, time-critical deadlines in an extraordinarily wide variety of commercial transactions, *e.g.*, closing documents for a house purchase; a contractor's bid; promotional materials for a one-day trade-show; a book retailer's order of the about-to-be-released Harry Potter book; an out-of-stock part needed by a service company to repair a car; a high school senior's college applications; and, of course, pleadings and briefs for filing in courts across the country. Our private lives, too, have come to rely on these services—the last-minute birthday gift to an out-of-town family member; the catalogue delivery of just-ordered clothes; homemade cookies to an armed services member; and the new computer purchased online.

The successful development of a national cargo transportation industry that can handle this massive volume of shipments is due in large part to Congress's

mandate in the Federal Aviation Administration Authorization Act (FAAAA) that the services of cargo carriers not be subject to an inefficient patchwork of state laws. Cargo carriers rely on that mandate to implement extensive, integrated transportation and package-handling networks that use uniform procedures and processes that do not vary merely because a truck or airplane crosses a state line. These uniform procedures allow carriers to focus on what they do best—moving billions of packages each year across the country to their ultimate destinations, often in a remarkable period of less than 24 hours—and to do it without disruptions from a multiplicity of state laws that would require special transportation services or restricted delivery service for particular types of goods shipped to particular States.

Petitioner, the Attorney General of Maine, ignores the far-reaching disruption of cargo carrier service that would result from his legal position that FAAAA preemption should be narrowed to apply solely to state laws enacted for the purpose of economic regulation. If his arguments prevail, any number of States will impose different standards on any number of different products that they deem unhealthy or unsafe. That would require carriers to comply with the divergent laws of a multitude of States for numerous different categories of goods and that is precisely what Congress intended to prevent. Forcing carriers to stop at each State's border to determine whether and how they can provide their transportation and delivery services for particular goods would fundamentally, and impermissibly, disrupt the timely and cost-effective flow of packages to our businesses and homes.

Petitioner attempts to overcome federal preemption in this case with the claim that Maine's laws are necessary to prevent the sale of tobacco to minors. But this case does not challenge in any way Maine's laws that prohibit such sale, that require the licensing of tobacco retailers, or that require retailers to confirm that purchasers of tobacco are of legal age to do so. Indeed, the court of appeals upheld the legality of Maine's prohibition on the knowing transportation or delivery of tobacco products from

unlicensed retailers to anyone other than a licensed retailer or distributor.

What the FAAAA does not permit, however, is Maine's regulation of the transportation and delivery services of cargo carriers to require them to create new services and to police shipments by entities who are not licensed as Maine tobacco retailers in a manner that substantially disrupts their entire transportation and delivery service networks.

STATEMENT

A. Statutory And Factual Background

1. The Federal Aviation Administration Authorization Act Of 1994 (FAAAA). For more than one hundred years, Congress has exercised its power under the Commerce Clause to impose virtually exclusive and uniform federal regulation over the interstate transportation of goods by cargo carriers. Congress established the Interstate Commerce Commission (ICC) in 1887 to regulate railroads, then placed motor carriers under the jurisdiction of the ICC with the Motor Carrier Act of 1935, Pub. L. No. 74-255, § 217, 49 Stat. 543, 560-561. In 1938, Congress enacted the Civil Aeronautics Act of 1938, Pub. L. No. 75-706, § 403(a), 52 Stat. 973, 992, giving the Civil Aeronautics Authority virtually exclusive jurisdiction over air commerce.

In 1978, Congress enacted the Airline Deregulation Act of 1978 (ADA), Pub. L. No. 95-504, § 105(a)(1), 92 Stat. 1705, 1708, to deregulate the airline industry through removal of substantial federal regulations and restrictions that were impeding the domestic airline industry. At the same time, Congress expressly preempted all state laws "relating to rates, routes, or services of any air carrier." *Ibid.* Congress did so to "ensure that the States would not undo federal deregulation with regulation of their own." *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 378 (1992).

Two years after enactment of the ADA, Congress initiated federal deregulation of the motor carrier industry

with the Motor Carrier Act of 1980, Pub. L. No. 96-296, 94 Stat. 793. By 1994, Congress determined that the benefits to carriers and consumers of deregulation were being impeded by ongoing state regulation of motor carriers' *intrastate* transportation of property. Congress explained that "[t]he sheer diversity of [state] regulatory schemes is a huge problem for national and regional carriers attempting to conduct a standard way of doing business." H.R. Conf. Rep. No. 103-677, at 87 (1994). Congress specifically identified state law restrictions on the "*types* of commodities carried" as a problematic form of state regulation that interfered with motor carriers' ability to provide uniform services. *Id.* at 86 (emphasis added).

Congress thus enacted the preemption provisions of the FAAAA in order to invalidate state laws that are related to the price, route, or service of motor, air, and intermodal (*i.e.*, combined air and ground transportation) carriers, thereby freeing carriers from the "patchwork of regulation" of the several States. *Id.* at 87. In doing so, Congress made explicit findings that the States' regulation of *intrastate* transportation of property by motor carriers "imposed an unreasonable burden on *interstate* commerce and impeded the free flow of trade, traffic, and transportation of interstate commerce" across the Nation. Pub. L. No. 103-305, § 601(a)(1)(A)-(B), 108 Stat. 1569, 1605 (1994) (emphasis added).

The FAAAA preemption provisions use language almost identical to that used in the ADA. The FAAAA specifies that "a State * * * may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of any motor carrier," 49 U.S.C. § 14501(c), or "of an air carrier or carrier affiliated with a direct air carrier through common controlling ownership when such carrier is transporting any property by aircraft or by motor vehicle (whether or not such property has had or will have a prior or subsequent air movement)." *Id.* § 41713(b)(4)(A). Congress intended that "all of the affected carriers" receive the same federal protection from state regulation that Congress had afforded air carriers since 1978 through the

ADA, including specifically the "broad preemption interpretation adopted by the United States Supreme Court" when it interpreted the ADA's express preemption provision in *Morales*, which was a then-recent ruling from this Court. H.R. Conf. Rep. No. 103-677, at 83.

2. The Maine Tobacco Delivery Law. In 2003, Maine enacted "An Act to Regulate the Delivery and Sales of Tobacco Products and to Prevent the Sale of Tobacco Products to Minors," 2003 Me. Laws 444 (Maine Tobacco Delivery Law).

The statute expanded Maine's regulation of tobacco reporting and licensing requirements in order to bring otherwise untaxed tobacco sales within its taxing authority. *See* 22 Me. Rev. Stat. § 1555-C(4). The provisions were summarized as "clarif[ying] the collection of taxes with regard to the delivery sales of cigarettes." Pet. App. 39 & n.25 (quoting L.D. 1236, Summary for the Original Legislative Document (121st Me. Legis. 2003)). Testimony in support of the Maine law explained that the State was "losing tremendous tax revenues as a result of these tax-free sales by unlicensed companies."[1]

A key component of Maine's effort to expand licensing (and thus taxing) is Section 1555-D, entitled "Illegal delivery of tobacco products," which is one of two provisions at issue before this Court. Section 1555-D states that a person "may not knowingly transport or cause to be delivered to a person in [Maine] a tobacco product purchased from a person who is not licensed as a tobacco retailer in [Maine]" unless the recipient, itself, is a Maine-licensed tobacco retailer or distributor. 22 Me. Rev. Stat. § 1555-D. The statute further declares that a person is "deemed to know" that a package contains a tobacco product if the package is marked "to indicate that the contents are tobacco products," *ibid.* and *id.* at § 1555-C(3)(B). The statute also deems a person to know that a package

[1] Pet. App. 3 (quoting Testimony of Rep. Glen Cummings Before the Joint Standing Comm. on Health & Human Servs. (Apr. 29, 2003)).

contains a tobacco product if the person "receives the package from a person listed as an unlicensed tobacco retailer" by the Attorney General, even if the package is not marked as containing tobacco. *Id.* § 1555-D.

In order to implement this provision, the Maine Attorney General is required by the statute to maintain two lists: One of known "*unlicensed* retailers" of tobacco (whose shipments may not be lawfully transported or delivered except to licensees); and the other of "*licensed* retailers" of tobacco in Maine (who are the only authorized recipients of tobacco shipped from unlicensed retailers). *Id.* § 1555-D(1) (emphasis added).

Although the Attorney General's list of "unlicensed retailers" is confidential under 22 Me. Rev. Stat. § 1555-D(1), and a delivery service that receives the list must maintain its confidentiality, *ibid.*, that list currently is posted on the Maine Attorney General's "Tobacco Delivery Compliance Page" website, *available at* http://www.maine.gov/ag/tobacco/delivery_compliance.html (last visited October 7, 2007). The posted list contains more than 400 different names, addresses, and email addresses, including entities from numerous foreign countries. *Ibid.* The list of Maine "licensed retailers" is public and contains approximately 2600 companies. *Ibid.*; J.A. 50.

The other provision of the Maine Tobacco Delivery Law that is at issue here is Section 1555-C(3)(C), entitled "Delivery sales of tobacco products." 22 Me. Rev. Stat. § 1555-C(3)(C). It governs the delivery of tobacco to Maine consumers from licensed tobacco retailers through the use of any "person * * * who is engaged in the commercial delivery of letters, packages, or other containers," which means any commercial cargo carrier. *Id.* §§ 1551(1-B)(B), 1555(1-C). Section 1555-C(3)(C) requires that a licensed retailer shipping tobacco to a consumer must use a carrier that imposes the following requirements: "(1) The purchaser must be the addressee; (2) The addressee must be of legal age to purchase tobacco products [18 years of age in Maine] and must sign for the package; and (3) If the addressee is under 27 years of age, the addressee must show valid

government-issued identification that contains a photograph of the addressee and indicates the addressee is of legal age to purchase tobacco products." *Id.* §§ 1555-C(3)(C), 1555-B(2); *see also id.* § 1551(1-B) (defining "delivery sale" to mean sale only to consumer).

The Maine Tobacco Delivery Law also imposes a host of requirements on retailers of tobacco to prevent sales to minors, which respondents do not dispute are within the State's authority to enact or enforce, such as requiring that retailers verify the age of tobacco buyers, including Internet sales. *Id.* §§ 1555-C(1)-(2), 1555-C(3)(B), 1555-C(4).

3. The Burdens Of The Maine Tobacco Delivery Law Imposed On Carrier Price, Routes and Services. In the district court proceedings, respondents introduced evidence regarding one of their members, UPS, which is the nation's largest commercial carrier, to demonstrate the burdens imposed by the Maine Tobacco Delivery Law.

a. At that time, UPS delivered approximately 13.6 million packages per day (3 billion packages per year). In Maine alone, UPS delivered approximately 65,000 packages per day, or 16 million per year. J.A. 42. To handle this massive volume and meet its guaranteed delivery times, UPS engages in extensive planning and coordination among its more than 1,700 operating facilities, 350,000 employees, 269 aircraft (as well as 313 chartered aircraft), and 88,000 vehicles that reach almost every address in the United States. J.A. 43, 45.

UPS has an Industrial Engineering Department that "design[s] UPS operations in a manner that makes them produce the highest levels of service to [its] customers in the most efficient manner possible and at the lowest possible cost." J.A. 42. It "conducts time and motion studies to determine the most efficient way to perform UPS's services with the greatest speed, and with the highest comfort for and lowest risk to our employees." *Ibid.* UPS analyzes tasks as mundane as where drivers place their ignition keys when they are delivering packages "in order to devise approved methods to minimize the time spent locating the key when returning

to the vehicle." *Ibid.* Shaving "even a second off" the time it takes to complete "a process that is repeated millions of times each day" "produces a material cumulative benefit to the overall efficiency of UPS's operations." *Ibid.*

UPS's transportation and distribution networks are based upon uniformity, *i.e.*, "repetition of the same processes and procedures for the documentation of packages, pick up of packages from shippers, and delivery to consignees, for all packages, regardless of their destination." J.A. 45. "Uniformity of operations and processes and efficiency keep down UPS's overall costs, and therefore affect the prices that UPS charges," *ibid.*, and helps UPS compete with the United States Postal Service, "which has its parcel business subsidized by its monopoly on first class mail." J.A. 46, 67-69.

As part of its uniform processes, "UPS shipping records and systems" do not ask UPS's regular pick-up customers to identify the contents of packages traveling within the United States (except where the shipper indicates that the package contains hazardous materials as defined by the nationally uniform standards established by the United States Department of Transportation under the Hazardous Materials Transportation Act (HMTA), 49 U.S.C. §§ 5101 *et seq.*). J.A. 44.[2] Shippers generally pack their own packages and UPS's shipping contracts require shippers to ensure that their packages do not violate any law. J.A. 44, 45. When UPS employees load packages onto

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[2] UPS's regular pick-up customers include the thousands of independently-owned shipping centers that serve their own customers by shipping packages for them using the shipping centers' UPS accounts. These shipping centers may ask their customers about package contents to ensure that the shipping centers do not ship a package that would violate their shipping contracts with UPS. Customers who ship packages at a UPS customer counter may be asked about package contents to ensure that the package complies with UPS's terms and conditions of service. Although UPS has the right to open and inspect packages, inspection happens infrequently such as when there is reason to suspect violation of hazardous materials procedures or a risk to UPS employees, customers, or the general public. J.A. 43-44.

a delivery truck, they "do not have to search for or read text on a package in order to identify it as requiring special handling, except to the extent such text might appear on such a nationally uniform identifying sticker." J.A. 47.

To meet its delivery deadlines, UPS must avoid even minor delays because a disruption at any point in UPS's operations can affect the delivery of thousands of packages in transit. For example, no delivery truck can leave a UPS operating center until the entire sorting and loading process is complete for all delivery vehicles. A delay of just a few minutes in sorting and loading can cause UPS to miss guaranteed delivery commitments for every package on every truck loaded at that facility. J.A. 48, 67-69.

b. Sections 1555-D and 1555-C(3)(C) of the Maine Tobacco Delivery Law impose substantial burdens that disrupt UPS's uniform services for transporting and delivering goods *of any kind* in Maine.

First, because carriers are presumed under Section 1555-D to know that a package shipped by anyone on the Maine Attorney General's list of "unlicensed retailers" is a package containing tobacco, UPS can be held liable if it delivers *any* package from such a shipper to a recipient who is not a Maine-licensed tobacco retailer or distributor, even if the package is not marked as containing tobacco.

Accordingly, to avoid violation of Section 1555-D, UPS must determine if any of the 65,000 packages that it delivers to Maine *each day* was shipped by any of the several hundred entities on the "unlicensed retailer" list, and UPS must prevent delivery of any such packages to any unlicensed recipient. J.A. 60; *see* http://www.maine.gov/ag/tobacco/delivery_compliance.html (last visited October 7, 2007).

UPS determined that it could not reasonably identify such packages at their points of origin into UPS's system because listed "unlicensed retailers" could include retailers in other States and countries. J.A. 60. Implementing special procedures in all 50 States and abroad for all

packages destined for Maine would have disrupted UPS's worldwide system (and would not have been fully effective). J.A. 59-60.

UPS determined that identification of such packages at an arrival point in Maine before delivery in Maine would also severely disrupt UPS's system because UPS's procedures for streamlining package handling require that employees who load delivery trucks *not* read or consider shipper information. J.A. 49, 73-74, 83-84. Requiring employees to read shippers' names and addresses on 65,000 packages each day and to check those names and addresses against a list of several hundred companies and addresses on the "unlicensed retailer" list "would have slowed all UPS deliveries in Maine to a near standstill." J.A. 60.

Ultimately, UPS determined that it was not operationally feasible to incur the extraordinary burdens it would face to attempt to compare every shipper name to the "unlicensed retailer" list to identify all packages shipped to Maine from such entities. Thus, UPS abandoned all deliveries of any tobacco products to any recipient in Maine other than an entity that is a Maine-licensed retailer or distributor, which are the only entities who can receive tobacco shipments lawfully from unlicensed retailers, even though the deliveries to other recipients would have been lawful if the shipper was a licensee. J.A. 60-61. UPS notified customers known or believed to be shippers of tobacco products that "UPS would no longer accept any tobacco product shipments to the State of Maine except to recipients who are licensed tobacco distributors or retailers." J.A. 61. UPS also amended its terms and conditions to state that "UPS only accepts shipments of tobacco products to recipients in the State of Maine who are licensed tobacco distributors or tobacco retailers." Pet. C.A. Sur-Reply Br., Addendum A (Feb. 2, 2006).

Second, Section 1555-C(3)(C) imposed substantial burdens that contributed to UPS's decision to abandon

deliveries of tobacco products to anyone other than a licensed retailer or distributor. J.A. 60-61. Section 1555-C(3)(C) requires that, for tobacco shipments to consumers, licensed retailers must use carriers that require that *the addressee* sign for the package in person and that the driver check a government-issued photo identification and the age of the addressee. J.A. 54-55. But UPS's standard practice permits delivery to persons such as mail room attendants, receptionists, or family members at the delivery address, and does not mandate checking age identification. J.A. 56.[3]

The addressee-signature and identification requirements of the Maine statute for consumer deliveries "would considerably expand the amount of time that a UPS delivery person would have to spend at a delivery stop." J.A. 56. The addressee in many cases would not be available immediately (or at all) to come to the delivery area to sign for a package, particularly if the delivery is at a work address. Increasing the time at delivery stops while waiting for an addressee, and having to make multiple delivery attempts for packages when the addressee is not available, would threaten the timely delivery of other packages on the same route. J.A. 56-58, 84-86. Drivers would have to spend more time at delivery stops and/or UPS would have to use more drivers per package, on modified routes, thereby raising operating costs and prices, which was not practical. J.A. 56-59.

Third, *even after* UPS prohibited shipments of tobacco products to non-licensees, UPS still had to take additional burdensome steps to minimize the risk of violating Section

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[3] UPS offers a service known as Delivery Confirmation Adult Signature Required (DCASR), which cost $2.75 in 2004 and requires an adult who is 21 years of age or older to sign for the package upon delivery, but does not require that it be the addressee who signs for the package. J.A. 51-56, 78-80. This service utilizes "smart" labels on the package which, when scanned, informs an employee through a clipboard computer of the special delivery requirements. J.A. 52. This service is uniformly administered and does not include 50 different handling requirements for 50 different States for a limitless number of products, which would be required under petitioner's legal position.

1555-D if shippers did not comply with UPS's prohibition and Maine law. Although UPS could not compare the name and address of every shipper on 65,000 packages daily to the "unlicensed retailer" list, UPS still had its employees read the shipper names to determine whether any name, itself, indicated that the shipper *might* be a tobacco retailer (*i.e.*, because the name contained a word like "smoke" or "cigars"), which meant it *might* be on the "unlicensed retailers" list. Also, UPS still had to attempt to identify and isolate from among the 65,000 packages that it delivers to Maine each day, any package that bore any marking suggesting that it contained tobacco. That is because UPS is deemed under Section 1555-D to know that a package it is delivering contains tobacco not only if the shipper is on the "unlicensed retailer" list, but also if the package is marked on any one of five sides as containing tobacco. *See* Pet. for Cert. 6 n.2 (subsequent Maine regulations, 10-144-203 Me. Code R. §§ 10(c)(2), 11, did not require examination of one side of packages, *i.e.*, the bottom, for tobacco markings); C.A. Jt. App. Vol. II 98, para. 96 (petitioner's admission that Maine's regulations still required UPS "to conduct five-sided visual scans of all packages to be delivered in Maine to search for and read text that might be a marking" made in "accordance with Section 1555-C(3)(B).").

Thus, UPS instructed its employees who load delivery trucks to depart from standard procedures, which do not require them to determine the contents of packages, do not require that they visually scan the package to search for or read text that is not on the label or on a nationally uniform sticker, and do not require them to read the shipper's name (or in most cases, even to read the addressee's name). J.A. 49. Instead, UPS instructed those employees in Maine to read the names of the shipper and the full text on every package (including the addressee name which also might include terms suggestive of tobacco contents) to determine whether any of those features could impute to UPS knowledge that the package contained tobacco products. J.A. 48-49.

Packages with markings of tobacco or shipper names that suggested they *might* be on the "unlicensed list" then

had to be taken to other UPS personnel who had to research whether the addressee was on Maine's list of more than 2,600 "licensed retailers," which would mean that the package could lawfully be delivered. J.A. 49-50, 74. If the addressee was not on the list, the package required additional handling, transportation and delivery services to return the package to the sender. Or, if the shipper was in Maine, such a return-to-sender delivery itself would violate Section 1555-D if the shipper was on the "unlicensed retailer" list, so UPS had to contact the shipper and require that the shipper retrieve the package from UPS or otherwise dispose of the package. J.A. 50, 75-76.[4]

Thus, even after abandoning lawful deliveries from Maine-licensees to non-licensees, UPS still faced disruptions and costs due to additional sorting, handling, transportation, and delivery services, which added significantly to the time and cost for processing and sorting *all* packages that UPS delivers in Maine. J.A. 49-50. UPS also incurred burdens and costs to provide special training for approximately 600 Maine employees to perform the additional tasks and special handling, as well as to provide and periodically update the Attorney General's "licensed retailer" list to its Maine operating centers. J.A. 61-63.

Fourth, even after taking all of these steps, UPS still bore the risk of being held liable for violation of Section 1555-D if a shipper violated Maine law and UPS's prohibition, but went undetected. For example, UPS would be liable if an "unlicensed retailer" shipped an unmarked package to someone other than a licensee and UPS's procedures failed to intercept the package because it did not bear any marking suggesting that the delivery would be unlawful. J.A. 60, 72.[5]

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[4] Petitioner erroneously asserts that UPS incurred costs for researching the addressee on only 33 packages. Pet. 11. The record establishes that UPS incurred costs for researching addressees on every package that was believed to contain tobacco products and that, *after this research*, 33 of the packages that were believed to contain tobacco products were found to be undeliverable. *See* J.A. 96, 117.

[5] Petitioner mischaracterizes the agreement that UPS entered into with the State of New York as a result of New York's regulation of

(Continued on following page)

B. PROCEEDINGS BELOW

1. Respondents are three trade associations whose members include motor and air carriers that transport goods in interstate and intrastate commerce. They brought the instant suit in the United States District Court for the District of Maine against petitioner in his official capacity as Attorney General of Maine, and requested an injunction against various provisions of the Maine law. Pet. App. 33-34. The parties filed cross-motions for summary judgment on respondents' as-applied challenge to the Maine law.

The district court ruled that the FAAAA preempts the Maine provisions at issue and enjoined their enforcement. *Id.* at 67-70, 72. The court emphasized that, "[i]f there is to be regulation in this area, it will have to come from the federal government." *Id.* at 32.

Based upon the record below, the district court found that "to comply with the Maine statute, UPS must use delivery services for Maine packages that vary from its nationally and internationally uniform services. This lack of uniformity affects the price of UPS' services and interferes with the orderly flow of packages by jeopardizing the speed, reliability and efficiency of delivery." *Id.* at 51-52 (footnotes

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cigarette deliveries by carriers. Pet. Br. 15. The agreement itself (at ¶ 15) demonstrates that UPS implemented a business decision to limit its shipments of cigarettes to licensed tobacco businesses and to cease shipments of cigarettes to consumers *before* entering into the agreement. <www.oag.state.ny.us/press/2005/oct/9tiupsaodfinal.oct.pdf> (last visited Oct. 9, 2007). That UPS made a business decision to implement a uniform, national policy regarding cigarette deliveries—even though that required UPS to abandon lawful commerce—is proof of the burdens on UPS's delivery services imposed by the evolving patchwork of state regulation of carriers' deliveries, including the threat of civil and/or criminal liability. The agreement reveals that, despite UPS's pre-existing extensive efforts to ensure compliance with the New York law and its own policies prohibiting shipments of cigarettes in violation of that law, it still faced liability if shippers tendered non-complying packages, thereby demonstrating the dramatic burdens that a carrier faces even after attempting to tailor its services to comply with state regulation. *Id.* at ¶¶ 8-12.

omitted). The district court also observed that there is no uniform rule for state regulation of tobacco deliveries so that regulations vary from State to State, *id.* at 40-42, and that the "growing complexity those laws will present to the market of interstate delivery demonstrates why Congress preempted individual state regulation in favor of a uniform federal approach." *Id.* at 60-61.

The court applied the standard articulated in *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 378 (1992), regarding whether a challenged state law is related to a rate, route or service of a carrier and thus preempted. Pet. App. at 52. The court concluded that the FAAAA preempts Section 1555-D because Section 1555-D both "expressly references" and imposes a "forbidden significant effect" on carrier services by requiring a carrier to "examine every package it receives with a Maine destination address to try to determine if the package contains tobacco products" and to "consult the Maine Attorney General's lists of Maine-licensed and known unlicensed tobacco retailers before deliver[ing] packages containing tobacco products." *Id.* at 55-56.

The court found that the FAAAA also preempts Section 1555-C(3)(C) because that provision has a "forbidden significant effect" on carriers' services. *Id.* at 63. The court found that, in order to make the necessary guarantees for a tobacco delivery to a consumer, a carrier would have to provide a Maine-specific service, and that these conditions alter a carrier's "delivery practices for packages" and can delay deliveries of such packages and other packages. *Id.* at 64-65.

2. The court of appeals affirmed the district court's conclusion that the FAAAA preempts the provisions of Sections 1555-D and 1555-C(3)(C) that are now at issue before this Court. *Id.* at 1-30.

The court of appeals rejected the petitioner's claim that the FAAAA preempts a state law only if the state law imposes "traditional economic regulation," such as "entry and commodity controls, tariff filing requirements, and price ceilings," and that the FAAAA does not preempt laws enacted pursuant to a State's police powers to protect

health or safety. *Id.* at 12-13. The court reasoned that "an exclusion from preemption for police-power enactments would surely 'swallow the rule of preemption,' as most state laws are enacted pursuant to this authority." *Id.* at 17-18 (quoting *United Parcel Serv., Inc. v. Flores-Galarza*, 385 F.3d 9, 14 (1st Cir. 2004)). Taking into account the broad language of the FAAAA, the structure of the FAAAA exceptions, the weight of the legislative history, including its express approval of the broad preemption standard in *Morales* for the parallel provision in the ADA, and this Court's subsequent interpretation of the same ADA provision in *American Airlines, Inc. v. Wolens*, 513 U.S. 219, 227-228 (1995), the court of appeals also concluded that the FAAAA is not limited to preemption of only state economic regulation. Pet. App. 14-21.

The court applied the *Morales* preemption standard and held that the FAAAA *does not* preempt the first part of Section 1555-D, which is the generally applicable prohibition against the knowing delivery of tobacco products from unlicensed shippers to unlicensed recipients. *Id.* at 24-27. But the court held that the FAAAA *does* preempt the second part of Section 1555-D, which imputes to a carrier the knowledge that a package contains tobacco if the package bears a marking to indicate that it contains tobacco or if the shipper is on the "unlicensed retailers" list maintained by the Attorney General. The court emphasized that the second part of Section 1555-D requires a carrier to "specially inspect every package destined for delivery in Maine," *id.* at 27, segregate any that are suspected of containing tobacco, and "research whether the addressee is a Maine-licensed retailer or distributor who can receive the package." *Id.* at 28. The court ruled that this part of Section 1555-D is preempted because it "has the effect of forcing UPS to change its uniform package-processing procedures," and "prescribe[s] how carriers must operate." *Ibid.*

The court of appeals also held that the FAAAA preempts Section 1555-C(3)(C) because that provision "expressly references a carrier's service of providing timely delivery of packages" and "prescribes the method by which a carrier operating in Maine must deliver packages in a

way that would affect the ability of a carrier to meet package-delivery deadlines" because it requires searching for the actual addressee, multiple delivery attempts if that addressee cannot be located at the time of delivery, obtaining that addressee's signature, and verifying that addressee's age. *Id.* at 23. The court rejected the argument that Section 1555-C(3)(C) is not preempted because it regulates only tobacco retailers rather than carriers, ruling that such an argument "reads the broad phrase 'related to' out of the statute." *Ibid.*

SUMMARY OF ARGUMENT

I. A. The Federal Aviation Administration Authorization Act of 1994 (FAAAA) expressly preempts "any" law that a State enacts or enforces that is "related to" a price, route, or service of a motor, air, or intermodal carrier of cargo. 49 U.S.C. §§ 14501(c), 41713(b)(4)(A). The FAAAA preempts the provisions of the Maine Tobacco Delivery Law at issue here because they are related to the services of cargo carriers. Although the State certainly can (and does) regulate the retailers and buyers of tobacco products to guard against sales to minors, the FAAAA preempts States from making carriers the enforcer of state licensing laws or dictating the services that carriers must offer.

By using the terms "any" and "related to" in the FAAAA, Congress enacted a preemption provision of substantial breadth. And Congress did so specifically to support the efficiency and cost-effectiveness of the nation's cargo transportation networks, which are critical to businesses and individuals across the country. Congress modeled the FAAAA preemption provisions on the preemption provision of the Airline Deregulation Act of 1978 (ADA), so that the FAAAA's preemption would have the same effect as that of the ADA. As such, this dispute is controlled by the Court's construction of the relevant statutory text in *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 383 (1992), where the Court held that state law is preempted by the ADA if the state law has a "forbidden significant effect" on, or expressly references, a carrier's rates, routes, or services.

There is no merit to petitioner's suggestion that this Court should abandon *Morales* and apply the Court's subsequent case law interpreting the Employee Retirement Income Security Act (ERISA). Congress could not anticipate, and did not intend to adopt, any subsequent developments in ERISA law that might alter the *Morales* analysis outside of the transportation context. Nor can petitioner rely on a presumption against preemption, which was key to the ERISA case law but which does not apply in the same manner in this area of traditional federal regulation of cargo carriers.

B. Under the *Morales* tests for ADA preemption that Congress endorsed for the FAAAA, or even under the ERISA case law on which petitioner erroneously relies, the Maine provisions are preempted. Both provisions at issue here, Sections 1555-D and 1555-C(3)(C), expressly reference carrier delivery services and have a "forbidden significant effect" on carrier services and preemption of these provisions is consistent with the objective of the FAAAA.

The express reference to carrier services is clear in Section 1555-D. Section 1555-D prohibits the knowing delivery of a tobacco product if it is from an unlicensed shipper to an unlicensed recipient and deems a person to have knowingly delivered a tobacco product if (1) the package is marked to indicate that it contains tobacco, or (2) the shipper of the package is on the Attorney General's list of "unlicensed retailers," even if the package is not marked as containing tobacco. 22 Me. Rev. Stat. § 1555-D. This provision adversely affects the timeliness and cost-effectiveness of carriers' transportation and delivery services because it requires carriers to identify and isolate all packages for which they are deemed to have knowledge of tobacco contents. It requires carriers to then take steps to determine either that each such package is deliverable because the shipper or addressee is on the "licensed retailer" list, or that it is undeliverable, in which case the carrier must return the undeliverable package, require the shipper to pick it up, or dispose of it.

Section 1555-C(3)(C) also expressly references carrier services and imposes a "forbidden significant effect" on the services of carriers because it dictates *what* specific delivery services a carrier must offer in order to provide delivery service for licensed retailers to consumers for certain packages in Maine. This provision requires a carrier to provide addressee-specific delivery and to check government-issued photo identification of the addressee for age confirmation. The FAAAA preempts such State laws that dictate what services a carrier must provide in order to enter or remain in a particular market.

The forbidden effects of these Maine provisions are so significant that UPS prohibited shipments of tobacco products to Maine except to Maine licensees and, thus, abandoned a legal segment of the interstate and intrastate transportation market of tobacco from licensed retailers to consumers. Even after that restriction of its services, UPS still incurred burdens in giving special handling to all of the 65,000 packages it delivers in Maine each day in order to minimize the risks of delivering to a consumer any package that UPS could be deemed to know contained tobacco either because the shipper was on the "unlicensed retailer" list or the package bore markings indicating it contained tobacco.

The preempted nature of the provisions is most obvious when one considers what the effect would be if several (or perhaps 50) States enacted similar laws regulating a variety of commodities. That patchwork of varying requirements on the transportation and delivery services of carriers would be cost prohibitive and would bring the cargo carrier industry to a standstill, which is precisely what Congress intended the FAAAA preemption provisions to prevent. Thus, preemption of the Maine law is entirely consistent with Congress's purpose in enacting the FAAAA and meets even petitioner's ERISA standard.

II. A. Unable to rebut the Maine Tobacco Delivery Law's reference to and significant burdens on carriers' service, the Maine Attorney General urges this Court to create an exception to FAAAA preemption. He wants the

Court to impose a limitation, nowhere mentioned in the statutory text, so that the FAAAA is read to preempt only economic regulation and not any regulation that was enacted, even in part, pursuant to a State's police power to protect health or safety. But if Congress had intended to preempt only "economic" state laws, it would have preempted only state laws that "'*regulate* rates, routes, and services.'" *Morales*, 504 U.S. at 385. And Congress would have had no need to enact the FAAAA's savings clauses to save from preemption certain specific areas of state law that would fall within petitioner's health or safety rubric.

Petitioner's argument for a health and safety exception to the FAAAA would require this Court to examine a State's motive in enacting a challenged state law, rather than the law's effect. This Court has repeatedly rejected such an inquiry as part of federal preemption. *Gade v. National Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 105 (1992). Preemption turns not on whether federal and state laws "are aimed at distinct and different evils" but whether they "operate on the same object," which, in the instant dispute, is a carrier's services. *Napier v. Atlantic Coast Line R. Co.*, 272 U.S. 605, 612 (1926).

B. Petitioner's unsupported assertion that Maine will not be able to protect its citizens from the health problems of tobacco is not true. Numerous provisions of the Maine law—*e.g.*, requiring *retailers* to obtain age verification from purchasers—are unaffected by the ruling in this case.

C. There is no merit to petitioner's repeated contention that the Synar Amendment supports a non-preemption ruling here. The Synar Amendment vested the Secretary of Health and Human Services with discretion to award grants to States that have a law that makes it unlawful for a "manufacturer, retailer, or distributor of tobacco products to sell or distribute any such product to any individual under the age of 18." 42 U.S.C. § 300x-26(a)(1). Nothing in that provision either authorizes or mandates States to regulate the manner in

which a *cargo carrier* provides transportation or delivery services.

D. Finally, apparently after scouring all the laws of the 50 States for examples of any law involving dangerous goods or contraband that Maine could claim might be preempted if the First Circuit's judgment is affirmed, Maine and its *amici* have identified only 20 or so such laws. Many of these laws are likely *not* preempted by the FAAAA under the decision below because they merely make unlawful the knowing transportation of some good, or are saved by some other provision of *federal* law. In all events, Maine has failed to demonstrate that any of these laws has ever been enforced against a carrier, making those laws of no assistance in the instant case.

ARGUMENT

I. THE FAAAA EXPRESSLY PREEMPTS SECTIONS 1555-D AND 1555-C(3)(C)

To determine whether a state law is preempted, this Court must start, and in this case may end, with the text of the statute itself. *See, e.g., CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664 (1993). It is the plain wording of a statute that "necessarily contains the best evidence of Congress' pre-emptive intent." *Ibid.* Thus, unlike petitioner, we rely on the text of the FAAAA.

A. The FAAAA's Text Demonstrates That Congress Intended Broadly To Preempt "Any" State Regulation "Related To" The Price, Route, Or Service Of A Carrier

The FAAAA contains two identically-worded express preemption clauses, which state that:

> a State, political subdivision of a State * * * may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of [a carrier].

49 U.S.C. § 14501(c) (applying to "any motor carrier * * * or any motor private carrier, broker, or freight forwarder with respect to the transportation of property"); *id.* § 41713(b)(4)(A) (applying to "an air carrier or carrier affiliated with a direct air carrier through common controlling ownership when such carrier is transporting property by aircraft or by motor vehicle").

By using the terms "any" and "related to," the language of the FAAAA preemption provisions conveys enormous breadth and confirms that Congress intended this law to broadly preempt state laws. The term "any" when "[r]ead naturally * * * has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.'" *United States v. Gonzales*, 520 U.S. 1, 5 (1997) (quoting *Webster's Third New International Dictionary* 97 (1976)). And the "related to" language does not say anything about limiting the scope of preemption to only laws that were enacted with an exclusively economic purpose. Indeed, such a distinction would "simply read[] the words 'related to' out of the statute." *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 385 (1992).

In any event, this is not an issue of first impression, nor did Congress intend it to be so.

1. The Court's interpretation of the broad, near-identical text of the Airline Deregulation Act established a clear legal test that applies to the FAAAA

Congress deliberately modeled the preemption provisions of the FAAAA in 1994 on the preemption provisions of the Airline Deregulation Act of 1978 (ADA), so that the FAAAA's preemption provision would have the same effect as the ADA preemption provision. Both statutes employ indistinguishable language with respect to the preemption of state laws.[6] The only difference is

[6] The ADA applies only to air carriers and the FAAAA applies to motor carriers and air and intermodal carriers when they transport

(Continued on following page)

that, when originally enacted, the ADA used the terms "relating" to "rates" while the FAAAA uses the terms "related" to "price"; the provisions now use identical terms.[7]

At the time Congress enacted the FAAAA, this Court already had determined the scope of the ADA's preemption provision based on its text, in the 1992 decision in *Morales v. Trans World Airlines*, 504 U.S. at 378. The *Morales* Court reasoned that the "key phrase" in the ADA's preemption provision is the term "relating to," and that "[t]he ordinary meaning of these words is a broad one—'to stand in some relation; to have bearing or concern; to pertain; refer; to bring into association with or connection with,' *Black's Law Dictionary* 1158 (5th ed. 1979)—and the words thus express a broad pre-emptive purpose." *Morales*, 504 U.S. at 383; *see also id.* at 384 (explaining that "relating to" is language that has a "broad scope" and an "expansive sweep"). The Court reasoned that, if Congress had intended to preempt only laws that directly regulated air carriers, "it would have forbidden the States to '*regulate* rates, routes, and services'" and not used the broader language of "relating to." *Id.* at 385.

To give effect to this provision, the Court held that a state law is one "relating to" a carrier's "rates, routes, or services," and thus is preempted, "'if it has a connection with, or reference to, such a plan.'" *Id.* at 384 (quoting *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 97 (1983)). The Court concluded that it did not matter that a state law "is not specifically designed to affect" the carrier, because a

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property. That confirms Congress's intended parallel construction of the ADA and FAAAA because it addressed a subset of air carrier transportation—involving carriage of property—in a new FAAAA preemption provision, 49 U.S.C. § 41713(b)(4)(A).

[7] At the time of *Morales*, the ADA preempted any state law "relating to rates, routes, or services of any air carrier." ADA, § 4(a), Pub. L. No. 95-504, 92 Stat. 1705, 1707-1708. The current version uses the phrase "related to a price, route, or service of any air carrier." 49 U.S.C. § 41713(b)(1).

state law is preempted even if "the effect is only indirect." *Id.* at 386 (quoting *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 139 (1990)). Accordingly, the Court held that state regulation is preempted if it has a "forbidden significant effect" on carrier rates, routes, or services. *Id.* at 388.

Petitioner argues that *Morales* did not mean what it said because "[t]he Court cautioned that it was not '[s]ett[ing] out on a road that leads to pre-emption of state laws against gambling and prostitution as applied to airlines.'" Pet. Br. 27 (quoting *Morales*, 504 U.S. at 390) (second brackets in original). But for the same reasons that the Court's cautionary note did not defeat preemption of fare advertising guidelines in *Morales*, 504 U.S. at 390, it also does not defeat preemption here. Respondents seek to invalidate state regulation of carriers' services, not the State's general prohibition against the sale or furnishing of tobacco to minors. Indeed, the ruling below upheld the State's prohibition against knowing transportation or delivery of tobacco from an unlicensed shipper to anyone other than a licensee.[8] Moreover, petitioner acknowledges that, even where generally-applicable state law prohibitions against gambling or the like are at issue, the *Morales* Court explained that preemption would require an analysis on a "case-by-case basis," Pet. Br. 27, and thus concedes that the Court did not hold that such laws were immune from preemption.

Applying the *Morales* legal test, this Court has twice held that the ADA preempts enforcement of generally applicable state consumer protection laws, once in *Morales* itself, in the context of enforcing guidelines for advertising airline fares, *id.* at 384, and once in the context of holding carriers liable for modifications of their frequent flier

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[8] Petitioner asserts that it is "conceded" that States can ban retailers entirely from shipping contraband items," Pet. Br. 38, but no such ban is before this Court and, depending on the particular state law, it could be subject to constitutional or statutory challenges, including under the FAAAA.

programs, *American Airlines, Inc. v. Wolens*, 513 U.S. 219 (1995). In neither case did the state laws at issue directly regulate rates, routes, or services, but in each case the state law had the effect of requiring any airline that operated within the State's jurisdiction to modify some conduct connected to its prices or services (advertising or frequent flier programs).

Wolens does not suggest that this Court has abandoned the legal test or holding of *Morales* for the ADA, as petitioner claims. *Id.* at 28-29. Rather, this Court in *Wolens* "adhere[d] to [its] holding in *Morales*," and explained that the ADA neither "demand[s] only minimal preemption" nor "mandate[s] total preemption," which otherwise would have included routine breach-of-contract claims. *Wolens*, 513 U.S. at 234. As petitioner acknowledges, preemption depends upon whether a state regulation's connection to the price, route, or service of a carrier is "'tenuous, remote or peripheral,'" Pet. Br. 28 (quoting *Morales*, 504 U.S. at 390), which is precisely what the *Morales* interpretation of the "relating to" text examined.

2. Congress intended the text of the FAAAA to bear the interpretation given that language in *Morales*

a. By using the same preemptive language of the ADA when enacting the FAAAA, Congress plainly intended that the *Morales* standard apply to the FAAAA.

This Court has repeatedly held that Congress is expected to know this Court's case law "when it import[s] the key phrase" of a statute into another statute. *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit*, 547 U.S. 71, 85 (2006); *see also Communications Workers of Am. v. Beck*, 487 U.S. 735, 746-747 (1988). And when "judicial interpretations have settled the meaning of an existing statutory provision, repetition of the same language in a new statute indicates, as a general matter, the intent to incorporate its * * * judicial interpretations as well." *Merrill Lynch*, 547 U.S. at 85 (quoting *Bragdon v. Abbott*, 524 U.S. 624, 645 (1998)).

This case presents the paradigmatic scenario for this rule of statutory construction because, in addition to the parallel language in the FAAAA and the ADA, the Conference Report on the FAAAA expressly stated that Congress intended its use of the language from the ADA to incorporate "the broad preemption interpretation adopted by the United States Supreme Court in *Morales*." H.R. Conf. Rep. No. 103-677, at 83 (1994). Congress explained that "[t]he central purpose" of the FAAAA "[wa]s to extend to all affected carriers, air carriers and carriers affiliated with direct air carriers through common controlling ownership on the one hand and motor carriers on the other, the *identical intrastate preemption of prices, routes and services*." *Ibid.* (emphasis added). Congress went so far as to explain that the FAAAA "is intended to function in the exact same manner with respect to its preemptive effects" as the ADA. *Id.* at 85.

Petitioner attempts to read the legislative history to dictate that *Morales* not apply, Pet. Br. 29-30, but his reliance upon certain legislative citations to *Federal Express Corp. v. California Public Utilities Commission*, 936 F.2d 1075 (9th Cir. 1991), *cert. denied*, 504 U.S. 979 (1992), a pre-*Morales* decision, is misplaced. Pet. Br. 29-30. Unlike Congress's affirmative embrace of *Morales* for its "broad preemption *interpretation*," H.R. Conf. Rep. No. 103-677, at 83 (emphasis added), the citations to *Federal Express* were only for the anomalous *result* that decision created. *Id.* at 87. *Federal Express* held that the ADA's use of the term "air carrier" encompassed an air carrier's trucking operations so that Federal Express benefited from ADA preemption regardless of whether it transported goods by plane or truck. *See Federal Express*, 936 F.2d at 1078-1079. With that context understood, petitioner's citation of stray legislative history discussing that case is of no relevance here. Pet. Br. 30. Congress's enactment of the FAAAA provision that applies to intermodal carriers, 49 U.S.C. § 41713(b)(4)(A), did in fact codify the Ninth Circuit's expansion of the *scope* of the ADA, but the legislative history says nothing about the Ninth Circuit's standard. *See Garcia v. United States*, 469 U.S. 70, 78

(1984) (rejecting out of context reliance upon legislative history).

3. This Court's subsequent ERISA decisions are irrelevant to interpretation of the FAAAA's text

Petitioner contends that recent developments regarding the Employee Retirement Income Security Act of 1974 (ERISA) supercede the standard for ADA preemption articulated in *Morales*, reaffirmed in *Wolens*, and endorsed by Congress in enacting the FAAAA.

Petitioner is mistaken. Congress chose the text of the FAAAA based on this Court's existing interpretation of near-identical language in the preemption provision of the ADA in *Morales*. Congress could not have anticipated, and did not intend to adopt, any subsequent developments in ERISA law to the extent they altered the *Morales* standard. It is Congress's understanding of the legal standard that it intended to incorporate in the text it chose at the time it enacted the statute that governs, not whether Congress correctly predicted the direction of future cases interpreting an unrelated statute. *See Brown v. General Servs. Admin.*, 425 U.S. 820, 828 (1976).

Moreover, this Court's ERISA cases rest in part on the understanding that ERISA occupies a field that otherwise would fall squarely within a State's police powers. In that context, an overly broad application of the "related to" standard might "read the presumption against pre-emption out of the law whenever Congress speaks to the matter with generality." *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 655 (1995).

That presumption does not apply in the same manner with respect to the FAAAA, which reflects congressional legislation in a field of longstanding federal presence (and, even if it did, Congress has expressed a "clear and manifest" intent to preempt state regulation such as

Maine's).[9] Although States once maintained authority to regulate *intrastate* transportation, Congress's authority over the *interstate* transportation of goods has long been recognized by this Court as plenary. The FAAAA was an exercise of Congress's authority over the interstate transportation of goods, which it found was being impeded by State regulation of intrastate transportation. Congress's extension of its prohibition against state regulation of the transportation of goods to intrastate commerce in light of that problem, reflected an incremental expansion in a field where congressional authority already dominated. For more than 100 years, Congress has exclusively regulated the interstate transportation of cargo, whether by rail, motor, or air carriage. *See* pages 3-4, *supra*; Br. of the Am. Trucking Ass'n & Chamber of Commerce of the United States as *Amici Curiae* in Support of Respondents 19-22 (Am. Trucking Ass'n Br.). Since the enactment of the Interstate Commerce Act in 1887, "the subject of interstate transportation of property has been regulated by Federal law to the exclusion of the power of the states to control in such respect by their own policy or legislation." *Boston & Maine R.R. v. Hooker*, 233 U.S. 97, 110 (1914). Accordingly, Congress long has possessed a "significant federal presence" in the field of interstate transportation, *Adams Express Co. v. Croninger*, 226 U.S. 491, 505-506 (1913), which precludes application of the presumption against preemption, *United States v. Locke*, 529 U.S. 89, 108 (2000) (holding that the presumption against preemption does not apply "in an area where there has been a history

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[9] Nowhere has the Court held that Congress cannot preempt state law merely because doing so would interfere with traditional state police powers. Congress preempted state regulation such as the Maine provisions at issue because the text of the FAAAA expresses a "clear and manifest" intent to preempt a State's police powers. *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 475 (1996); *Egelhoff v. Egelhoff*, 532 U.S. 141, 151-152 (2001) (explaining that this Court has "not hesitated" to overcome the presumption against preemption "in areas of traditional state regulation such as family law").

of significant federal presence"); *Medtronic v. Lohr*, 518 U.S. 470, 485 (1996) (presumption applies only to "a field which the States have traditionally occupied").

B. The FAAAA Preempts Sections 1555-D And 1555-C(3)(C) Because They Explicitly Reference, Have A Substantial And Onerous Effect On, And Thus Are Related To, A Carrier's Service

1. Sections 1555-D and 1555-C(3)(C) explicitly reference services of carriers

a. Section 1555-D expressly references transportation and delivery services of carriers when it prohibits the knowing transportation or delivery of tobacco products from an unlicensed retailer (unless delivered to a licensed retailer), and deems a person to "know" that a package contains tobacco if it is received from a listed "unlicensed retailer" or is marked as containing tobacco. 22 Me. Rev. Stat. § 1555-D. The statute mandates that the State provide lists of licensed and unlicensed tobacco retailers to carriers (which are referred to as "delivery service[s]" in the statute) and to no other entities; indeed, carriers must keep confidential the "unlicensed retailer" list that they receive. *Id.* § 1555-D(1). Any argument that this provision does not explicitly reference the services of carriers is thus without merit.

b. Likewise, Section 1555-C(3)(C) explicitly references the services of carriers when it states that, for shipments to consumers, a tobacco shipper can use only a carrier that provides detailed delivery services that are specified in the statute. Section 1555-C(3)(C) dictates the scope of the carrier's delivery service and dictates the precise method by which that delivery must be made, which includes addressee-specific signature and age confirmation through government-issued photo identification.

These references in the Maine laws to the services of carriers render them indistinguishable from those preempted in *Morales*, because "every one of the" delivery

requirements "bears a 'reference to'" carrier delivery services. *Morales*, 504 U.S. at 388. It would be nonsensical to conclude that these express directives as to what delivery services carriers must offer and how deliveries must be made are not "related to" the "service" of the carriers who make those deliveries. 49 U.S.C. §§ 14501(c)(1), 41713(b)(4)(A).

2. Sections 1555-D and 1555-C(3)(C) Have A "Forbidden Significant Effect" On The "Price, Route, Or Service" Of A Carrier

a. Section 1555-D imposes a forbidden significant effect on carrier transportation and delivery services because it deems a carrier to know that a package contains tobacco if it is shipped by an entity on the State's "unlicensed retailer" list of hundreds of entities, or bears a marking that indicates that it contains tobacco. That provision means that a carrier must somehow isolate such packages from among all the packages delivered in Maine (65,000 per day by UPS alone). J.A. 59-60, 74. And, in addition to that Herculean task, the carrier then also must provide special handling for all such isolated packages, including researching each of them to determine whether it can be lawfully delivered because either the shipper or the addressee is on the "licensed retailer" list of more than 2,600 entities. If the package is not deliverable, the carrier must provide additional services to return the package to the shipper, have the shipper pick up the package, or destroy it. *See* pages 9-13, *supra* (discussing burden evidence); *see also* J.A. 50, 74-76.

These burdens on carrier transportation and delivery services are very significant because they mean that a carrier such as UPS cannot apply its otherwise uniform package-handling procedures that are critical to its timely and cost-effective delivery services for all packages. J.A. 67-70. Indeed, the burden on UPS of the threshold requirement that it identify all packages shipped to Maine by anyone on the "unlicensed retailer" is so great that it

would bring UPS's operations in Maine to a near standstill. J.A. 60-61. UPS thus had to abandon the lawful delivery of tobacco products from licensed shippers to consumers in Maine. UPS notified its customers that it would accept tobacco products for shipment in Maine only to Maine licensees and amended its terms and conditions accordingly. *See* page 10, *supra*.

Even after changing its service in Maine, UPS still had to attempt to minimize its risk of liability under the statute through various alterations in its services aimed at identifying any packages that are shipped through UPS in violation of the Maine law and UPS's prohibition against shipping tobacco products to unlicensed recipients in Maine. UPS had to alter its uniform procedures to require its Maine employees to read the shipper's name (something they generally do not do) to determine whether the name, itself, indicated that the shipper *might* be a tobacco retailer (*i.e.*, because the name contained a word like "smoke" or "cigars"), and that meant that it *might* be on the "unlicensed retailers" list. Also, UPS still had to attempt to identify and isolate from among the 65,000 packages that it delivered to Maine each day, any package that bore a marking suggesting that it contained tobacco, which required reading text on the box (including the addressee name which could indicate tobacco contents). These additional steps required additional time, imposed higher costs, and required additional training of 600 UPS employees in Maine. J.A. 50, 61-63, 72, 95.[10]

Petitioner attempts to diminish the burden on carriers by contending that UPS already had its employees visually scan the sides of every box before imposition of the Maine requirements. Pet. Br. 48-49. That argument is misleading because it ignores that UPS employees previously looked at the sides of a package only to examine

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[10] Petitioner concedes that it cost $2 per each package researched to determine "whether the addressee is a licensed retailer or distributor." J.A. 96. Thus, UPS incurs a $2 cost for *any* package that is *suspected* of containing tobacco. *Ibid.*

the integrity of the box (*e.g.*, to confirm it was sealed and not damaged) and to look for nationally-uniform stickers (such as for hazardous materials), not to read whatever text might appear on the package to determine what the package might contain. J.A. 49. In any event, that argument focuses on only one of the burdens Section 1555-D imposes, and petitioner fatally ignores the burden of having to check the shipper information on each of the 65,000 packages delivered to Maine daily against the State's "unlicensed retailer" list.

b. Section 1555-C(3)(C) also has a forbidden significant effect on carriers' service because it dictates *what* delivery services a carrier must provide to certain packages within the State. Section 1555-C(3)(C) mandates that, for shipments to consumers, a licensed tobacco shipper must use a delivery service that requires signature by the addressee and confirmation of the age of the addressee, including through government-issued photo identification.

Petitioner concedes that offering that service would require modifications to UPS's prices, routes, and services, such as reengineering of tracking devices and information systems. J.A. 83-84. And respondents also provided evidence below that it was not economically feasible for UPS to offer that service. J.A. 55, 59.[11]

Although UPS offered a service of "Delivery Confirmation Adult Signature Required" (DCASR), that service differs dramatically from the Maine requirements. DCASR does not require that the person to whom UPS delivers the package be the addressee on the package.

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[11] Petitioner derides the evidence from UPS on which the courts below relied because it is only *one* carrier. Pet. Br. 41. But UPS is one of the three major commercial carriers in the United States, with more than 13.6 million deliveries each day—and more than 3 billion packages annually, hardly inadequate carrier evidence. J.A. 42. And preemption applies if the state law is related to the price, route, or service of "*any* motor carrier" or "*an* air carrier," so evidence from a single carrier is sufficient (otherwise one competitor would have an advantage over the others and disrupt the competitive marketplace, Pet. App. 69). 49 U.S.C. §§ 14501(c)(1), 41713(b)(4)(A) (emphasis added).

Rather, it allows UPS to deliver such packages to mail room employees, receptionists, and family members, as long as an adult signs for the package. J.A. 53, 56, 84. UPS determined that alteration of its delivery services to comply with the requirement that the recipient be the specific person listed as addressee on the package and the requirement for age verification, would increase the time spent at delivery stops, thereby threatening the timely delivery of other packages on the same route and/or forcing UPS to use more drivers per package, on modified routes, which increases costs and prices. J.A. 56-59.[12]

Petitioner asserts that the effect on carrier services is tangential because there is no evidence that the state-mandated service could not be offered profitably. Pet. Br. 45 (speculating that the state-mandated service might be "profitably priced at $3.00 * * * , rather than $2.75 for the *present* service"). But that argument proves preemption because it concedes that Section 1555-C(3)(C) is related to and indeed will dictate carrier prices. *See* 49 U.S.C. §§ 14501(c), 41713(b)(4)(A) (preempting state regulation related to carrier "price").[13]

Petitioner's argument that Section 1555-C(3)(C) has only an indirect effect on carrier price, route, and service and does not require carriers to offer the services that shippers *must* use (Pet. Br. 40, 44) ignores the rulings in *Morales* and *Wolens*. Just as a carrier is not required to

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[12] Petitioner suggests that UPS treats addressees and recipients the same on its website, and that, thus, UPS offers an addressee only service. Pet. Br. 14. This is simply not the case. J.A. 51-53; *see also* J.A. 84 (petitioner admitting that UPS does not offer a service requiring the addressee to sign for the package), 92 (same). Indeed, petitioner's only support for its proposition is a citation to general packaging guidelines on how to label packages. For obvious reasons, a package *must* bear the name of a recipient or addressee, but that fact alone does not preclude UPS from delivering the package to other individuals at that address.

[13] Whether or not UPS *could* offer a service complying with Section 1555-C(3)(C), Pet. Br. 12-13, 45, is immaterial because that would not mean that it is *economically* or *operationally* feasible for it to do so. The facts prove here that it is not. J.A. 59.

deliver tobacco products, neither were the carriers in *Morales required* to advertise nor were the carriers in *Wolens required* to offer a frequent flier program. But both cases held state laws preempted because the state regulation nevertheless related to the air carrier's "rate, route, or service." *Morales*, 504 U.S. at 386 (explaining that a state law may be preempted even if "the effect is only indirect") (quoting *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 139 (1990)). A carrier's ability to transport and deliver lawful products certainly is at least equal to, if not more related to its services, than advertising or a frequent flyer program.

Moreover, this Court has rejected efforts by States to evade a prohibition on regulation in a particular area by attempting to regulate indirectly through restrictions on essential actors in that area. For example, in *Engine Manufacturers Ass'n v. South Coast Air Quality Management District*, 541 U.S. 246 (2004), the Court held that a federal law that preempts state "standard[s] relating to the control of emissions from new motor vehicles," preempts not only state regulation of vehicle manufacturers, but also state restrictions on purchasers. *Id.* at 259 (quoting 42 U.S.C. § 7543(a)). That is because "[t]he manufacturer's right to sell federally approved vehicles is meaningless in the absence of a purchaser's right to buy them." *Id.* at 255.

Petitioner's contention that Section 1555-C(3)(C) is not preempted because "[i]t neither forces UPS to enter nor prevents it from competing for the legal tobacco delivery market," Pet. Br. 44, is similar to the argument rejected by this Court in *Egelhoff v. Egelhoff* when the Court held that a state law was preempted under ERISA even though the state law that affected the relevant plan benefits allowed employers to "opt out" of the state law's effects. 532 U.S. 141, 150 (2001). The fact that some carriers may decide to comply with the state law (and offer the state-mandated service) while other carriers may decide to forgo tobacco deliveries means that the state regulation "dictate[d]" the choice facing the carrier. *Ibid.*

3. Even under petitioner's ERISA standard, preemption of Sections 1555-D and 1555-C(3)(C) is consistent with the objective of the FAAAA to prevent a 50-State patchwork

Petitioner's proffered ERISA standard does not govern the FAAAA for the reasons set forth above. *See* pages 27-28, *supra*. But, even if petitioner's ERISA standard were applied here, the FAAAA's preemption of Sections 1555-D and 1555-C(3)(C) is clear. This Court's ERISA precedents apply the same "reference to" or "forbidden significant effect" analysis as under *Morales*, but impose an additional gloss to ensure that preemption is consistent with the objective of the federal law. *California Div. of Labor Standards Enforcement v. Dillingham Constr., N.A., Inc.*, 519 U.S. 316 (1997). That standard is easily met here.

a. Preemption of the Maine law is wholly consistent with Congress's purpose in enacting the FAAAA. Sections 1555-D and 1555-C(3)(C) are precisely "the type of law that Congress intended * * * to supercede." Pet. Br. 43 (citing ERISA decisions of *Dillingham* and *Travelers*) (quoting *De Buono v. NYSA-ILA Med. & Clinical Servs. Fund*, 520 U.S. 806, 814, 816 n.16 (1997)). Congress expressly intended to free carriers from the effects of burdensome state regulation, including those regarding particular commodities, and had as a core purpose the establishment of a federal legal framework that would not allow the development of a patchwork of carrier regulation that varied from State to State. FAAAA, Pub. L. No. 103-305, § 601(a)(1), 108 Stat. 1569, 1605 (1994).

Petitioner's own *amici* demonstrate that the Maine Attorney General's view of the law would allow just such a patchwork of state laws related to a carriers' services that it was Congress's intent to prevent. The *amici* States note that the FAAAA threatens "the laws of 40 states that prohibit or severely restrict the transport and delivery of tobacco products." Brief of California, *et al.* as *Amicus Curiae* Supporting Petitioner (States' Br.) 5. And the

States concede that these laws "differ in the restrictions they impose." *Id.* at 12. Indeed, petitioner's position would allow an even more dramatic patchwork of inconsistent regulation of interstate carriers because it would allow each of the 50 States to adopt its own laws dictating the transportation and delivery services not just for packages containing tobacco, but for any number of different products. *See* Am. Trucking Ass'n Br. 14-15.

This Court has recognized the relevance of such state-by-state variation to preemption analysis in *Morales*, 504 U.S. at 389 (emphasizing that the requirement that the advertised fares include "taxes and surcharges [that] vary from State to State," meant that it "force[d] the airlines to create different ads in each market"). And, even in the ERISA context, the Court looks beyond the burden of complying with one State's law because such reasoning opens the door to all 50 States requiring compliance with their own peculiar requirements. *Egelhoff*, 532 U.S. at 151.

The patchwork result is particularly pertinent to cargo carriers governed by the FAAAA because, as petitioner acknowledges, uniformity and integrated services are essential to nationwide carriers but such "[u]niformity is impossible * * * if [carriers] are subject to different legal obligations in different States." *Id.* at 148; J.A. 68-69. Unless the FAAAA is given its broad preemptive scope, as intended by Congress, state regulation of carriers' prices, routes, and services will continue to proliferate. *See, e.g.*, *United Parcel Serv., Inc. v. Flores-Galarza*, 385 F.3d 9 (1st Cir. 2004); *Witty v. Delta Air Lines*, 366 F.3d 380 (5th Cir. 2004).

b. There is no credence to petitioner's claim that Section 1555-D or 1555-C(3)(C) do not make "reference to" carrier price, route or service under the ERISA standard because those provisions apply to "more entities than those motor carriers covered by the FAAAA." Pet. Br. 42. In *Dillingham*, this Court explained that, under the "reference to" standard, a state law is preempted "where the existence of ERISA plans is essential to the law's

operation, as in [*District of Columbia v.*] *Greater Washington Bd. of Trade*[, 506 U.S. 125 (1992)]." *Dillingham*, 519 U.S. at 325. Sections 1555-D and 1555-C(3)(C) are preempted under the *Greater Washington* standard because a carrier's services are "essential" to their operation (and the mere fact that the Maine law expands its definition of a delivery service inconsequentially beyond carriers cannot be a means for States to defeat "reference to" preemption). Section 1555-C(3)(C) plainly mandates the existence of specific delivery services in order for the law to properly function, and Section 1555-D mandates that the State's lists of "licensed retailers" and "known unlicensed retailers" be provided to carriers (and only carriers) precisely because their services are essential to that provision's prohibition of deliveries from unlicensed retailers to unlicensed recipients. Accordingly, "[i]t makes no difference that" the Maine law also applies to others, outside the scope of the FAAAA, "once it is determined that the law in question relates to" a carrier's price, routes or service. *Greater Washington*, 506 U.S. at 131.

Sections 1555-D and 1555-C(3)(C) are far more than an "indirect economic influence" on carrier service under the ERISA standard, *Dillingham*, 519 U.S. at 329 (quoting *Travelers*, 514 U.S. at 659), as petitioner suggests. The Maine law "bind[s]" carriers to offering one type of service that is explicitly required by state regulation if they are lawfully to be used to carry tobacco products. *Ibid.* *Travelers* and *Dillingham* would be apposite only if the Maine law provided economic incentive (such as tax breaks) rather than creating a barrier to entry. *Travelers*, 514 U.S. at 658-659 (explaining that the state law made commercial insurance more expensive than Blue Cross/Blue Shield insurance, which influenced insurance purchasers, including ERISA plans).[14]

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[14] Petitioner argues the "incentive" is the option to enter the tobacco delivery market. Pet. Br. 44. But that argument ignores the very authorities upon which petitioner relies. The result in *Travelers* would have been different if the state law mandated that ERISA plans

(Continued on following page)

II. PETITIONER'S ATTEMPTS TO RESTRICT FAAAA PREEMPTION ARE WITHOUT MERIT

A. Restriction Of FAAAA Preemption To "Economic Regulation" And Creation Of A Health And Safety Exception Is Contrary To The FAAAA's Savings Clauses And History And Would Be Unworkable

Unable to avoid the clear statutory text of the FAAAA and the Maine laws' obvious references to and burdens on carrier services, petitioner attempts to confine FAAAA preemption to "economic" regulation—*viz.*, state laws that actually "regulate" rather than are "related to" the price, route, or service of a carrier. Yet petitioner never establishes that the challenged provisions are not economic relations in that sense. Although petitioner repeatedly refers to the Maine Tobacco Delivery Law as an effort by the State to prevent the sale of tobacco to minors, he ignores the fact that the Maine statute was enacted to address problems related to the loss of tax revenue from tobacco sales by unlicensed retailers. *See* page 5, *supra*. In any event, however, FAAAA preemption is not limited only to "economic" regulation.

1. The structure of the FAAAA, specifically its savings clauses, confirms that FAAAA preemption is not limited to economic regulation. The FAAAA provides for preemption of state law "[e]xcept as provided in" the "matters not covered" sections of the statute. 49 U.S.C. §§ 14501(c)(1), 41713(b)(4)(A). The FAAAA's saving clauses—*i.e.*, the "matters not covered" by the statute—explicitly exclude from preemption the

- "safety regulatory authority of a State with respect to motor vehicles,"
- "the authority of a State to impose highway route controls or limitations based on the size or

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purchase insurance solely from Blue Cross/Blue Shield, even if the State of New York argued that it was merely offering an "incentive" for ERISA plans to provide hospital care benefits within the State.

weight of the motor vehicle or the hazardous nature of the cargo," and

- "the authority of a State to regulate motor carriers with regard to minimum amounts of financial responsibility relating to insurance requirements and self-insurance authorization."

49 U.S.C. §§ 14501(c)(2)(A), 41713(b)(4)(B)(i).[15]

Each of these areas was, and is, the subject of a separate statutory grant of congressional authority to permit state regulation within the defined limits of an existing comprehensive federal regulatory scheme. *See* 49 U.S.C. § 5125 (transportation of hazardous cargo), *id.* at § 14504(2)(A)(ii) (minimum amounts of financial responsibility related to insurance), *id.* at §§ 31111-31113 (restrictions on size of motor vehicles), *id.* at § 30103(b) (motor vehicle safety standards), *id.* at §§ 31131-31147 (commercial motor vehicle safety); *see also* J.A. 16-19.

Consistent with the narrow scope of these savings clauses, this Court explained in *City of Columbus v. Ours Garage & Wrecker Service, Inc.*, 536 U.S. 424 (2002), that the "matters not covered" in the FAAAA are "an *exception* to th[e] general rule" of preemption. *Id.* at 428 (emphasis added). The scope of the savings clauses are the "enumerated matters" that "are not covered by the preemption provision." *Id.* at 429.

Petitioner cites *Ours Garage* for the unremarkable conclusion that "State nonuniformity for nonpreempted state regulations was permitted and expected." Pet. Br. 33 (citing *Ours Garage*, 536 U.S. at 441). That permission for state laws is based not on an economic versus noneconomic distinction, but on Congress's "decision to enact both a general policy that furthers a particular goal" of

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[15] FAAAA preemption also does not apply to the transportation of household goods, *see* 49 U.S.C. §§ 14501(c)(2)(B), 41713(b)(4)(B)(ii); *Flores-Galarza*, 385 F.3d at 14 (explaining that this exception applies to the specialized services offered by moving companies), and, with respect to motor carriers, certain state regulations relating to tow trucks, 49 U.S.C. § 14501(c)(2)(C).

preemption, as well as "a specific exception that might tend against that goal"—*i.e.*, the "matters not covered," *Ours Garage*, 536 U.S. at 440, where there is a federal overlay or touchstone for state regulation.

As a last resort, petitioner argues that the savings clauses are illustrative rather than exhaustive, suggesting that the Maine law could be shoehorned into the "matters not covered." Pet. Br. 35. But the preemption provisions explicitly apply "except as provided in" the "matters not covered" sections. Had Congress wanted to exempt goods related to public health and safety (such as tobacco), it would have done so, as it clearly knew how to craft exceptions from preemption, and in fact did so. *See United States v. Brockamp,* 519 U.S. 347, 352 (1997) ("explicit listing of exceptions" to running of limitations period demonstrates Congress's intent to preclude "courts [from] read[ing] other unmentioned, open-ended, 'equitable' exceptions into the statute"); *Raleigh & Gaston R.R. Co. v. Reid*, 80 U.S. 269, 270 (1871) ("[w]hen a statute limits a thing to be done in a particular mode, it includes a negative of any other mode"). Petitioner's reliance on the Conference Report (Pet. Br. 35, citing H.R. Conf. Rep. No. 103-677, at 84) is out of context and does not contradict our reading. That report indicated that its list was not an exclusive catalog of what specific types of state laws avoid preemption under some of the more broadly enumerated "matters not covered."

2. Congress's express findings at the time it enacted the FAAAA, which are notably absent from petitioner's brief, do not permit judicial restriction of FAAAA preemption to "economic" regulation. Congress found that the States' "regulation of intrastate transportation of property" "imposed an unreasonable burden on interstate commerce," impeded the free flow of interstate commerce, and imposed unreasonable costs on consumers. FAAAA, Pub. L. No. 103-305, § 601(a)(1), 108 Stat. 1569, 1605 (1994); *see* App., *infra*, 6a. These findings clearly confirm that Congress was concerned about the *effect* of state regulation on interstate carriers services. Congress's findings provide no support whatsoever to suggest that

Congress was concerned about whether the State's purpose underlying a challenged state law was economic or not.[16]

Petitioner's reliance on legislative history (Pet. Br. 30-34) cannot stand up to these findings. Petitioner relies solely on some references to state economic regulation that appear in the Conference Report and hearing testimony. It is not the law, however, that a federal statute cannot have effects beyond those enumerated in the legislative history. *See Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79 (1998) ("statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed"). Legislative history often focuses on the most blatant violations leading to the enactment of legislation, while the statute is drafted to eliminate the problem, now and in the future.

Indeed, the legislative history, like the express congressional findings, demonstrates that Congress was concerned with the *effect* of state laws on the price, route, or service of a carrier. The conferees explained that "[t]he sheer diversity of these regulatory schemes is a huge problem for national and regional carriers attempting to conduct a standard way of business." H.R. Conf. Rep. 103-677, at 87. In fact, a "typical" form of regulation that Congress intended to preempt was state law controls on the "types of commodities carried." *Id.* at 86. Section 1555-C(3)(C)'s requirement that a carrier must offer specific services to carry certain "types of commodities" is a close analog.

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[16] Petitioner cites (Pet. Br. 5) the fact that one of the two FAAAA preemption provisions at one point contained the word "economic" in its title, but he fails to acknowledge that the word "economic" was removed from that provision just one year later in the ICC Termination Act of 1995, Pub. L. No. 104-88, ch. 145, § 14501(c), 109 Stat. 899.

3. In all events, petitioner's proffered preemption analysis, urging judicial determination of the purported purposes underlying a state law, has been repeatedly rejected by this Court. This Court has long held that federal preemption analysis turns not on whether a state law is "aimed at distinct and different evils" than those Congress intended to preempt, but instead whether the state and federal law "operate on the same object," which, in the instant dispute is a carrier's prices, routes, or services. *Napier v. Atlantic Coast Line R. Co.*, 272 U.S. 605, 612 (1926).

The purpose of state laws has never been a touchstone of this Court's preemption analysis. For example, in determining whether a state law was preempted by the Occupational Safety and Health Act of 1970, which preempted all state "occupational safety and health standards *relating to* any occupational safety or health issue with respect to which a Federal standard has been promulgated," this Court held that the Court would not "rely solely on the [state] legislature's professed purpose [and] look as well to the effects of the law." *Gade v. National Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 105 (1992).

Moreover, discerning the legislative purpose of state regulation is anything but an exact science. "Evaluating the legality of acts arising out of mixed motives can be complex, and affixing a single label to those acts can be hazardous, even when the actor is an individual performing a discrete act." *League of United Latin Am. Citizens v. Perry*, 126 S. Ct. 2594, 2609 (2006) (plurality) (citation omitted). That task is "even more daunting" when "the actor is a legislature and the act is a composite of manifold choices." *Ibid.* Indeed, petitioner's approach "would enable state legislatures to nullify nearly all unwanted federal legislation by simply publishing a legislative committee report articulating some state interest or policy—other than [the interest prohibited by federal law]—that would be tangentially furthered by the proposed state law." *Perez v. Campbell*, 402 U.S. 637, 652 (1971).

B. States Have Ample Means To Protect Their Citizens From Health And Safety Concerns

Petitioner decries preemption on the ground that it will leave Maine unable to protect minors from tobacco, Pet. Br. 19, 21, 36, 39-40, 50, and argues that nothing in the record demonstrates that Maine can enforce its laws against sales of tobacco to minors without Sections 1555-D and 1555-C(3)(C). But this argument fails to account for the other means Maine can use to regulate the sales of tobacco to consumers that are provided in the statute itself.

First, the State may continue to regulate retailers and buyers of tobacco products. Respondents do not challenge the portions of Maine law that require retailers involved in "delivery sales" (generally sales over Internet, by telephone, mail or cargo carrier) (1) to be licensed; (2) to obtain age verification from purchasers in the form of a copy of a valid government-issued document and to verify that information against a database of government records; (3) to obtain payment by credit card or check if a sale is the result of an Internet advertisement; (4) to mark packages as containing tobacco products; and (5) to report delivery sales to the Maine Bureau of Revenue Services. 22 Me. Rev. Stat. §§ 1555-C(1)-(2), 1555-C(3)(B), 1555-C(4). Respondents also do not challenge the provision of the Maine Tobacco Delivery Law that makes it unlawful to submit required information for a delivery sale in the name of another person. *Id.* § 1555-C(5). Nothing in the First Circuit's decision prevents enforcement of these requirements.

The State can readily enforce these types of regulations, for example, through review of tobacco retailers' websites to determine whether unlicensed retailers offer to sell tobacco products to Maine residents, and by sting operations to order tobacco products from such retailers to determine if they comply with the non-preempted state regulations. Indeed, the *amicus*

curiae brief submitted by various States reports that California conducted just such an investigation in which the State arranged for minors to visit web sites and to attempt to purchase tobacco products. States' Br. at 10.

Second, to the extent that petitioner believes that state regulation of carriers' transportation and delivery services is essential to combating delivery sales of tobacco products to minors, the decision below permits enforcement against carriers of Section 1555-D's prohibition against knowing delivery of tobacco products from unlicensed shippers to anyone other than a licensed retailer or distributor, so long as enforcement is based on evidence of actual knowledge and not on the imputed knowledge provision—a fact that petitioner repeatedly overlooks. And States have been capable of proving violations of such laws without Maine's statutorily-imputed knowledge of package contents. *See Robertson v. State of Washington Liquor Control Bd.*, 10 P.3d 1079, 1081 (Wash. Ct. App. 2000) (State demonstrated that a carrier transported contraband cigarettes in violation of state statute based upon the driver's having "personally hauled" those cigarettes).

C. The Synar Amendment Does Not Authorize States To Regulate Carriers

There is no merit to petitioner's repeated contention that the Synar Amendment has bearing on the instant case. Pet. Br. 24, 37-39. The Synar Amendment is a federal funding statute that vests the Secretary of Health and Human Services with discretionary authority to award grants to States that have "in effect a law providing that it is unlawful for any manufacturer, retailer, or distributor of tobacco products to sell or distribute any such product to any individual under the age of 18." 42 U.S.C. § 300x-26(a)(1). Nothing in that provision authorizes States to regulate the manner in which a cargo carrier provides services.

Petitioner argues that the term "distributor" encompasses carriers, but that term, in its ordinary meaning, refers to a wholesaler of tobacco products. Petitioner's unique interpretation contradicts the Secretary of Health and Human Services' construction of that term, which is entitled to considerable deference. *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984). In promulgating regulations under the Synar Amendment, the Secretary explained that acceptable state laws would include "a tobacco sales or distribution licensing system similar to that used for alcoholic sales." Substance Abuse Prevention and Treatment Block Grants, 58 Fed. Reg. 45,156 (Aug. 26, 1993). That view of "distribution" is in accord with the definition of "distributor" in the Maine law itself, which requires *distributors* to be licensed by the State and defines the term "tobacco distributor" as separate and distinct from the defined term "delivery service." *Compare* 22 Me. Rev. Stat. § 1551(2-B), *with*, *id.* at § 1555(1-B).[17]

As a last resort, petitioner invokes the proposition that "'all powers and duties incidental and necessary to make such legislation effective are included by implication.'" Pet. Br. 38 (quoting 2B N. Singer, *Statutes and Statutory Construction*, § 55:04, at 388 (6th ed. 2000)). But that principle applies "[w]here a statute confers powers or duties in general terms"—an introductory clause that petitioner conveniently omits, Singer, *supra*, § 55:04, at 388. Here, the *duty* in the Synar Amendment is imposed upon the Secretary of Health and Human Services, not the States, to determine whether the States comply with the federal mandate. Petitioner, of course, can point to no regulation by the Secretary indicating that carriers should be regulated. *Id.* at § 55:04, at 390.

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[17] Although no discord between the FAAAA and Synar Amendment exists, any conflict would require that the Secretary's construction of the Synar Amendment be used to harmonize the two laws. *National Ass'n of Home Builders v. Defenders of Wildlife*, 127 S. Ct. 2518, 2534 (2007).

D. State Statutes Regarding Other Products Do Not Advance Petitioner's Argument

Petitioner and his *amici* States apparently scoured the 50 state codes for examples of any law involving dangerous goods or contraband that Maine could claim might be preempted if the First Circuit's judgment is affirmed, but they found only 20 or so such laws. *See* Pet. Br. 23-24 nn.36-37; States' Br. 16 nn.12-17, 18-19 nn.18-24. We think it fair to assume that these laws are the best that exist to make petitioner's point. Petitioner provides no evidence that any of those statutes ever, in fact, has been enforced against carriers before or after enactment of the FAAAA. Indeed, many of these laws are likely not preempted by the First Circuit's construction of the FAAAA, which supports affirmance here.

First, at least a third of the laws cited by Maine and its *amici* fall outside the scope of the First Circuit's FAAAA preemption ruling because they make criminal only the "knowing" transportation of certain items. The First Circuit expressly held that the FAAAA does not preempt state statutes that prohibit conduct by persons with actual knowledge that what they are transporting is prohibited. Pet. App. 25-26.[18]

Second, four of the state statutes involve the transportation of game (*e.g.*, a wild animal or bird) by a carrier. Pet. Br. 23-24 n.36; States' Br. 16 nn.12-16 (citing laws from Arizona, Florida, Maine, and Vermont). When originally enacted, such laws appear to have been sanctioned by *federal law—i.e.*, the Lacey Act of 1900, ch.

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[18] *See* Pet Br. 24 n.36 (citing 17-A Me. Rev. Stat. §§ 1001(1)(B), 1118, 554-B(2)); States' Br. 16 n.3 (citing Fla. Stat. Ann. § 372.16(3)); *id.* at 18 n.18 (citing McKinney's Agric. & Mkts. Law § 96-z-11); *id.* at 18 n.19 (citing Ariz. Rev. Stat. Ann. § 13-3502(2)). A state-of-mind requirement also exists in some of the cited statutes regulating transportation of liquor, *see* Pet. Br. 23 n.36, and, of course, Congress's authority to preempt state regulation of alcohol is subject to different analysis under the Twenty-First Amendment. U.S. Const. amend. XXI, § 2.

553, 31 Stat. 187, which made it unlawful for a common carrier to transport interstate "any dead birds or animals" from the State in which they were killed if state law prohibited their "export." 31 Stat. at 188, § 3.[19] By tying the federal crime to a state law prohibiting exportation, Congress apparently treated those laws as not preempted by other federal statutes.

Third, three of the state statutes regulate the transportation of fireworks or explosives. Pet. Br. 24 n.36; States' Br. 18 n.21 (citing law from Colorado). The two Maine statutes incorporate *federal* regulations issued under the Hazardous Materials Transportation Act (HMTA), 49 U.S.C. §§ 5101 *et seq.*[20] The HMTA is a comprehensive federal scheme that regulates the "safe transportation * * * of hazardous material in intrastate, interstate, and foreign commerce," 49 U.S.C. § 5103(b), and includes many provisions that regulate motor carriers. The HMTA has a broad preemption provision regarding State adoption of standards that are not "substantively the same" as the detailed federal regulations, but federal law embraces a limited role for State adoption of the federal standards as their own. *See id.* § 5125(b)(2) (if the

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[19] In the Lacey Act Amendments of 1981, Pub. L. No. 97-79, 95 Stat. 1073, 16 U.S.C. § 3372(a)(2), Congress spoke in terms of "transport" rather than "export," but there has been no federal preemption litigation under either version of the statute that we can identify.

[20] The Maine law regulating the transportation of fireworks prohibits their transportation "except as permitted by the rules adopted by" the state public safety commissioner, 8 Me. Rev. Stat. § 225, which incorporate particular standards of the National Fire Protection Association, *see* 16-219-25 Me. Code R. § 2 (2006), which in turn provide that federal HMTA regulations apply. *See* National Fire Protection Association, NFPA 1124: Code for the Manufacture, Transportation, Storage and Retail Sales of Fireworks and Pyrotechnic Articles § 8.1, at 1124-32 (NFPA 2003). The Maine criminal statute governing the transportation of explosives likewise incorporates Maine regulations, *see* 17-A Me. Rev. Stat. § 1001, which in turn incorporate the federal regulations. *See* 16-219-31 Me. Code R. § 1 (2006) (incorporating NFPA Standard).

Department of Transportation has issued a regulation related to hazardous material, a State "may prescribe, issue, maintain, and enforce only a law, regulation, standard, or order about the subject that is substantively the same as [the federal] provision"). The United States Department of Transportation, which has particular preemption authority under the statute, *id.* §§ 5125(e) & (f), "has long encouraged States to adopt and enforce the [federal regulations] as State law" in order "[t]o encourage the nationwide application of uniform requirements." Requirements on the Transfer and Storage of Hazardous Wastes, 60 Fed. Reg. 62,527, 62,530 (Dec. 6, 1995). Thus, the substantive requirements of the Maine laws that incorporate the federal standard may be preserved by the HMTA from FAAAA preemption.[21]

To be clear, there may be some other state statutes on the books somewhere that are preempted in whole or in part solely by the FAAAA (although the fact that neither petitioner nor its *amici* were able to identify more than a handful of modern statutes that may colorably be preempted confirms the reasonableness of the First Circuit's interpretation). But even in those situations in which state laws are no longer enforceable against carriers, the FAAAA does not create a lawless lacunae. Federal regulation imposing uniform requirements on carriers remains in effect. In addition to the federal statutes discussed above regarding the transportation of wildlife and hazardous materials such as fireworks and explosives, the federal government regulates the conduct of carriers on other matters cited by petitioner and his *amici* regarding transportation and delivery of firearms,

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[21] By contrast, it appears that the Colorado law governing the packing and labeling of nitroglycerine cited by petitioner's *amicus*, States' Br. 18 n.21 (citing Colo. Rev. Stat. § 9-6-102), is not substantively the same as the federal regulations and would be preempted by the HMTA.

drugs, adulterated food, infested plants, and animals. *See* Pet. Br. 24 nn.36-37; States' Br. 16, 18-19.[22]

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

PAUL T. FRIEDMAN
RUTH N. BORENSTEIN
LAWRENCE R. KATZIN
MORRISON & FOERSTER LLP
425 Market Street
San Francisco, CA
94105-2482

BETH S. BRINKMANN
Counsel of Record
BRIAN R. MATSUI
MORRISON & FOERSTER LLP
2000 Pennsylvania Avenue, N.W.
Washington, DC 20006
(202) 887-1544

Counsel for Respondents

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[22] *See, e.g.*, 18 U.S.C. § 922(f) (transportation of firearms and ammunition); 21 U.S.C. § 331(c) (delivery of adulterated or misbranded food, drug, device, or cosmetic); *id.* at § 610(c) (transportation of uninspected meat or adulterated or misbranded meat capable of use as human food); *id.* at § 458(a)(2) (same regarding poultry); *id.* at §§ 624, 463(a) (storage and handling of meat and poultry during transport); 7 U.S.C. §§ 7711, 7712 (movement of plants that would disseminate a plant pest); *id.* at § 8305 (movement of any "animal, article, or means of conveyance * * * to prevent the introduction or dissemination of any pest or disease of livestock"); 49 U.S.C. § 80502 (prohibiting carriers from confining animals in a vehicle for more than 28 consecutive hours without unloading for feeding, water, and rest); 7 U.S.C. § 2143(a)(4) (requiring humane treatment of certain animals during transportation).

APPENDIX A

The relevant provisions of the Airline Deregulation Act of 1978 and the Federal Aviation Administration Authorization Act of 1994 as codified in title 49 of the United States Code provide:

§ 14501 Federal authority over intrastate transportation

* * *

(c) Motor Carriers of Property.—

(1) General rule.—Except as provided in paragraphs (2) and (3), a State, political subdivision of a State, or political authority of 2 or more States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of any motor carrier (other than a carrier affiliated with a direct air carrier covered by section 41713 (b)(4)) or any motor private carrier, broker, or freight forwarder with respect to the transportation of property.

(2) Matters not covered.—Paragraph (1)—

(A) shall not restrict the safety regulatory authority of a State with respect to motor vehicles, the authority of a State to impose highway route controls or limitations based on the size or weight of the motor vehicle or the hazardous nature of the cargo, or the authority of a State to regulate motor carriers with regard to minimum amounts of financial responsibility relating to insurance requirements and self-insurance authorization;

(B) does not apply to the transportation of household goods; and

(C) does not apply to the authority of a State or a political subdivision of a State to enact or enforce a law, regulation, or other provision relating to the price of for-hire motor vehicle transportation by a tow truck, if such transportation is performed without the prior consent or authorization of the owner or operator of the motor vehicle.

(3) State standard transportation practices.—

(A) Continuation.—Paragraph (1) shall not affect any authority of a State, political subdivision of a State, or political authority of 2 or more States to enact or enforce a law, regulation, or other provision, with respect to the intrastate transportation of property by motor carriers, related to—

(i) uniform cargo liability rules,

(ii) uniform bills of lading or receipts for property being transported,

(iii) uniform cargo credit rules,

(iv) antitrust immunity for joint line rates or routes, classifications, mileage guides, and pooling, or

(v) antitrust immunity for agent-van line operations (as set forth in section 13907), if such law, regulation, or provision meets the requirements of subparagraph (B).

(B) Requirements.—A law, regulation, or provision of a State, political subdivision, or political authority meets the requirements of this subparagraph if—

(i) the law, regulation, or provision covers the same subject matter as, and compliance with such law, regulation, or provision is no more burdensome than compliance with, a provision of this part or a regulation issued by the Secretary or the Board under this part; and

(ii) the law, regulation, or provision only applies to a carrier upon request of such carrier.

(C) Election.—Notwithstanding any other provision of law, a carrier affiliated with a direct air carrier through common controlling ownership may elect to be subject to a law, regulation, or provision of a State, political subdivision, or political authority under this paragraph.

(4) Nonapplicability to Hawaii.—This subsection shall not apply with respect to the State of Hawaii.

* * *

§ 41713. Preemption of authority over prices, routes, and service

(a) Definition.—In this section, "State" means a State, the District of Columbia, and a territory or possession of the United States.

(b) Preemption.—**(1)** Except as provided in this subsection, a State, political subdivision of a State, or political authority of at least 2 States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier that may provide air transportation under this subpart.

(2) Paragraphs (1) and (4) of this subsection do not apply to air transportation provided entirely

in Alaska unless the transportation is air transportation (except charter air transportation) provided under a certificate issued under section 41102 of this title.

(3) This subsection does not limit a State, political subdivision of a State, or political authority of at least 2 States that owns or operates an airport served by an air carrier holding a certificate issued by the Secretary of Transportation from carrying out its proprietary powers and rights.

(4) Transportation by air carrier or carrier affiliated with a direct air carrier.—

(A) General rule.—Except as provided in subparagraph (B), a State, political subdivision of a State, or political authority of 2 or more States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier or carrier affiliated with a direct air carrier through common controlling ownership when such carrier is transporting property by aircraft or by motor vehicle (whether or not such property has had or will have a prior or subsequent air movement).

(B) Matters not covered.—Subparagraph (A)—

(i) shall not restrict the safety regulatory authority of a State with respect to motor vehicles, the authority of a State to impose highway route controls or limitations based on the size or weight of the motor vehicle or the hazardous nature of the cargo, or the authority of a State to regulate motor carriers with regard to minimum

amounts of financial responsibility relating to insurance requirements and self-insurance authorization; and

(ii) does not apply to the transportation of household goods, as defined in section 13102 of this title.

(C) Applicability of paragraph (1).— This paragraph shall not limit the applicability of paragraph (1).

APPENDIX B

The relevant provisions of the Federal Aviation Administration Authorization Act of 1994, Pub. L. No. 103-305, 108 Stat. 1569, provide:

> **§ 601. Preemption of Intrastate Transportation of Property.**
>
> **(a) Findings.**—Congress finds and declares that—
>
> **(1)** the regulation of intrastate transportation of property by the States has—
>
> **(A)** imposed an unreasonable burden on interstate commerce;
>
> **(B)** impeded the free flow of trade, traffic, and transportation of interstate commerce; and
>
> **(C)** placed an unreasonable cost on the American consumers; and
>
> **(2)** certain aspects of the State regulatory process should be preempted.

APPENDIX C

MAINE STATUTES INVOLVED

The relevant provisions of An Act to Regulate the Delivery and Sales of Tobacco Products and to Prevent the Sale of Tobacco Products to Minors, 22 Me. Rev. Stat. § 1551 *et seq.*, provide:

§ 1551. Definitions

1-A. Consumer. "Consumer" means an individual who purchases, receives or possesses tobacco products for personal consumption and not for resale.

1-B. Delivery sale. "Delivery sale" means a sale of tobacco products to a consumer in this State when:

A. The purchaser submits the order for the sale by means of telephonic or other electronic method of voice transmission, the Internet or any delivery service; or

B. The tobacco products are delivered by use of a delivery service.

1-C. Delivery service. "Delivery service" means a person, including the United States Postal Service, who is engaged in the commercial delivery of letters, packages or other containers.

* * *

2-A. Person. "Person" means an individual, corporation, partnership or unincorporated association.

* * *

§ 1555-C. Delivery sales of tobacco products

The following requirements apply to delivery sales of tobacco products within the State.

1. License required. It is unlawful for any person to accept an order for a delivery sale of tobacco products to a consumer in the State unless that person is licensed under this chapter as a tobacco retailer. The following penalties apply to violations of this subsection.

A. A person who violates this subsection commits a civil violation for which a fine of not less than $50 and not more than $1,500 may be adjudged for each violation.

B. A person who violates this subsection after having been previously adjudicated as violating this subsection or subsection 2, 3 or 4 commits a civil violation for which a fine of not less than $1,000 and not more than $5,000 may be adjudged.

2. Requirements for accepting order for delivery sale. The following provisions apply to acceptance of an order for a delivery sale of tobacco products.

A. When accepting the first order for a delivery sale from a consumer, the tobacco retailer shall obtain the following information from the person placing the order:

(1) A copy of a valid government-issued document that provides the person's name, current address, photograph and date of birth; and

(2) An original written statement signed by the person documenting that the person:

(a) Is of legal age to purchase tobacco products in the State;

(b) Has made a choice whether to receive mailings from a tobacco retailer;

(c) Understands that providing false information may constitute a violation of law; and

(d) Understands that it is a violation of law to purchase tobacco products for subsequent resale or for delivery to persons who are under the legal age to purchase tobacco products.

B. If an order is made as a result of advertisement over the Internet, the tobacco retailer shall request the e-mail address of the purchaser and shall receive payment by credit card or check prior to shipping.

C. Prior to shipping the tobacco products, the tobacco retailer shall verify the information provided under paragraph A against a commercially available database derived solely from government records consisting of age and identity information, including date of birth.

D. A person who violates this subsection commits a civil violation for which a fine of not less than $50 and not more than $1,500 may be adjudged for each violation.

E. A person who violates this subsection after having been previously adjudicated as violating this subsection or subsection 1, 3 or 4

commits a civil violation for which a fine of not less than $1,000 and not more than $5,000 may be adjudged.

3. Requirements for shipping a delivery sale. The following provisions apply to a tobacco retailer shipping tobacco products pursuant to a delivery sale.

A. Prior to shipping, the tobacco retailer shall provide to the delivery service the age of the purchaser as provided under subsection 2, paragraph A and verified under subsection 2, paragraph C.

B. The tobacco retailer shall clearly mark the outside of the package of tobacco products to be shipped to indicate that the contents are tobacco products and to show the name and State of Maine tobacco license number of the tobacco retailer.

C. The tobacco retailer shall utilize a delivery service that imposes the following requirements:

(1) The purchaser must be the addressee;

(2) The addressee must be of legal age to purchase tobacco products and must sign for the package; and

(3) If the addressee is under 27 years of age, the addressee must show valid government-issued identification that contains a photograph of the addressee and indicates that the addressee is of legal age to purchase tobacco products.

D. The delivery instructions must clearly indicate the requirements of this subsection and must declare that state law requires compliance with the requirements.

E. A person who violates this subsection commits a civil violation for which a fine of not less than $50 and not more than $1,500 may be adjudged for each violation.

F. A person who violates this subsection after having been previously adjudicated as violating this subsection or subsection 1, 2 or 4 commits a civil violation for which a fine of not less than $1,000 and not more than $5,000 may be adjudged.

4. Reporting requirements. No later than the 10th day of each calendar month, a tobacco retailer that has made a delivery sale of tobacco products or shipped or delivered tobacco products into the State in a delivery sale in the previous calendar month shall file with the Department of Administrative and Financial Services, Bureau of Revenue Services a memorandum or a copy of each invoice that provides for each delivery sale the name and address of the purchaser and the brand or brands and quantity of tobacco products sold. A tobacco retailer that meets the requirements of 15 United States Code, Section 375 et seq. (1955) satisfies the requirements of this subsection. The following penalties apply to violations of this subsection.

A. A person who violates this subsection commits a civil violation for which a fine of not less than $50 and not more than $1,500 may be adjudged for each violation.

B. A person who violates this subsection after having been previously adjudicated as violating this subsection or subsection 1, 2 or 3 commits a civil violation for which a fine of not less than $1,000 and not more than $5,000 may be adjudged.

5. Unlawful ordering. It is unlawful to submit ordering information for tobacco products by delivery sale under subsection 2, paragraph A in the name of another person. A person who violates this subsection commits a civil violation for which a fine of not more than $10,000 may be adjudged.

6. Rulemaking. The department and the Department of Administrative and Financial Services shall adopt rules to implement this section. Rules adopted pursuant to this subsection are routine technical rules as defined in Title 5, chapter 375, subchapter 2-A. [5 M.R.S.A. § 8071, et seq.]

7. Forfeiture. Any tobacco product sold or attempted to be sold in a delivery sale that does not meet the requirements of this section is deemed to be contraband and is subject to forfeiture in the same manner as and in accordance with the provisions of Title 36, section 4372-A.

8. Enforcement. The Attorney General may bring an action to enforce this section in District Court or Superior Court and may seek injunctive relief, including a preliminary or final injunction, and fines, penalties and equitable relief and may seek to prevent or restrain actions in violation of this section by any person or any person controlling such person. In addition, a violation

of this section is a violation of the Maine Unfair Trade Practices Act.

§ 1555-D. Illegal delivery of tobacco products

A person may not knowingly transport or cause to be delivered to a person in this State a tobacco product purchased from a person who is not licensed as a tobacco retailer in this State, except that this provision does not apply to the transportation or delivery of tobacco products to a licensed tobacco distributor or tobacco retailer. A person is deemed to know that a package contains a tobacco product if the package is marked in accordance with the requirements of section 1555-C, subsection 3, paragraph B or if the person receives the package from a person listed as an unlicensed tobacco retailer by the Attorney General under this section.

1. Lists. The Attorney General shall maintain lists of licensed tobacco retailers and known unlicensed tobacco retailers. The Attorney General shall provide to a delivery service lists of licensed tobacco retailers and known unlicensed tobacco retailers. The list of known unlicensed tobacco retailers is confidential. A delivery service that receives a list of known unlicensed tobacco retailers shall maintain the confidentiality of the list.

2. Penalty. The following penalties apply for violation of this section.

A. A person who violates this section commits a civil violation for which a fine of not less than $50 nor more than $1500 may be adjudged for each violation. A fine imposed under this paragraph may not be suspended.

B. An employer of a person who, while working and within the scope of that person's employment, violates this section commits a civil violation for which a fine of not less than $50 nor more than $1,500 may be adjudged for each violation. A fine imposed under this paragraph may not be suspended.

3. Enforcement. The Attorney General may bring an action to enforce this section in District Court or Superior Court and may seek injunctive relief, including a preliminary or final injunction, and fines, penalties and equitable relief and may seek to prevent or restrain actions in violation of this section by any person or any person controlling such person. In addition, a violation of this section is a violation of the Maine Unfair Trade Practices Act.

4. Affirmative defense. It is an affirmative defense to a prosecution under this section that a person who transported tobacco products or caused tobacco products to be delivered reasonably relied on licensing information provided by the Attorney General under this section.

5. Rulemaking. The department shall adopt rules to implement this section. Rules adopted pursuant to this subsection are routine technical rules as defined in Title 5, chapter 375, subchapter 2-A.

6. Forfeiture. Any tobacco product sold or attempted to be sold in a delivery sale that does not meet the requirements of this section is deemed to be contraband and is subject to forfeiture in the same manner as and in accordance with the provisions of Title 36, section 4372-A.

(10)

No. 06-457

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SUPREME COURT, U.S.

In The
Supreme Court of the United States

G. STEVEN ROWE, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF THE STATE OF MAINE,

Petitioner,

v.

NEW HAMPSHIRE MOTOR TRANSPORT ASSOCIATION, MASSACHUSETTS MOTOR TRANSPORTATION ASSOCIATION, INC., and VERMONT TRUCK & BUS ASSOCIATION, INC.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

BRIEF FOR PETITIONER

G. STEVEN ROWE
Attorney General
PAUL STERN
Deputy Attorney General
(Counsel of Record)
MELISSA REYNOLDS O'DEA
CHRISTOPHER C. TAUB
PETER B. LAFOND
Assistant Attorneys General
Office of the Attorney General
6 State House Station
Augusta, ME 04333-0006
Tel: (207) 626-8568

Counsel for Petitioner

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. Whether the Federal Aviation Administration Authorization Act of 1994, 49 U.S.C. §§ 14501(c)(1) and 41713(b)(4)(A), preempts states from exercising their historic public health police powers to regulate carriers that deliver contraband such as tobacco and other dangerous substances to children.

2. Whether the Federal Aviation Administration Authorization Act of 1994 preempts states from exercising their historic public health police powers to require shippers of contraband such as tobacco and other dangerous substances to utilize a carrier that provides age verification and signature services to ensure that such substances are not delivered to children.

PARTIES TO THE PROCEEDING

Petitioner G. Steven Rowe is the Attorney General of the State of Maine, acting in his official capacity. Respondents New Hampshire Motor Transport Association, Massachusetts Motor Transportation Association, Inc., and Vermont Truck and Bus Association, Inc., are trade associations of businesses engaged in the commercial delivery of packages containing property.

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BRIEF FOR PETITIONER

Petitioner G. Steven Rowe respectfully requests that the Court reverse the judgment of the United States Court of Appeals for the First Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals is reported at 448 F.3d 66. Pet. App. 1. The district court's opinions are reported at 377 F. Supp. 2d 197, 324 F. Supp. 2d 231, and 301 F. Supp. 2d 38. Pet. App. 31, 73, and 86.

JURISDICTION

The judgment of the court of appeals was entered on May 19, 2006. This Court granted certiorari on June 25, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Article VI, clause 2 of the Constitution provides that the laws of the United States "shall be the supreme Law of the Land; . . . any Thing in the Constitution or Laws of any state to the Contrary notwithstanding."

2. In 1992, Congress enacted the Synar Amendment, so-called, Pub. L. No. 102-321, Title II, § 202, 106 Stat. 323, 394, which conditions state eligibility for the receipt of certain federal funds upon the state having in effect and

enforcing "a law providing that it is unlawful for any manufacturer, retailer, or distributor of tobacco products to sell or distribute any such product to any individual under the age of 18." 42 U.S.C. §§ 300x-26(a)(1) & (b)(1). The Synar Amendment is reproduced at App. 1, *infra*.

3. The Federal Aviation Administration Authorization Act of 1994 ("FAAAA"), Pub. L. No. 103-305, § 601, 108 Stat. 1569, 1605, preempts certain state laws regarding the transport of property by air or motor carriers, 49 U.S.C. §§ 14501(c), 41713(b)(4)(A) & (B). The FAAAA is reproduced at App. 2, *infra*.

4. Maine bans the sale or furnishing of tobacco to children. 22 Me. Rev. Stat. §§ 1555-B(1) & (2). In pursuit of that goal, Maine's Tobacco Delivery Law regulates retailers who ship tobacco products by means of delivery sale and persons who transport and deliver tobacco products in Maine. *Id.* at §§ 1555-C(3), 1555-D. These statutes are reproduced at App. 6, *infra*.

STATEMENT OF CASE

Maine has the sovereign power to protect the health of its children. This case provides the first opportunity for the Court to consider whether the FAAAA preempts a state's exercise of such power, here implementing a ban on the sale and distribution of tobacco to children pursuant to and in full conformance with a clear congressional policy that the State do so. The import and reasoning of the court of appeals' decision is that Maine cannot enact a law controlling how a retailer may ship tobacco or any other dangerous substance into this State, and that Maine cannot use the only actual evidence available to enforce a

ban on the delivery of tobacco or any other dangerous substance or contraband. When Congress enacted the FAAAA, it did not intend to preempt these types of public health delivery laws, and they do not interfere with the objectives of the FAAAA. The court of appeals' decision therefore should be reversed.

I. Statutory Framework.

A. The Synar Amendment and State Regulation of Tobacco.

"[T]obacco use, particularly among children and adolescents, poses perhaps the single most significant threat to public health in the United States." *Federal Drug Administration v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 161 (2000). There is no comprehensive federal tobacco law dealing with youth access to tobacco products. Instead, "there is an established congressional policy that supports" state laws prohibiting tobacco sales to minors; "Congress has required States to prohibit tobacco sales to minors as a condition of receiving federal block grant funding for substance abuse treatment activities." *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 552 (2001). In 1992 Congress enacted the Synar Amendment, Pub. L. No. 102-321, Title II, § 202, 106 Stat. 323, 394, codified at 42 U.S.C. §§ 300x-26(a)(1) & (b)(1), which specifically encourages states to pass laws making it "unlawful for any manufacturer, retailer, or distributor of tobacco products to sell or distribute any such product to any individual under the age of 18." *See Lorillard*, 533 U.S. at 571.

The Synar Amendment does not limit the discretion of or dictate how each state may accomplish this, and does not prescribe uniform regulation by the states. In adopting

rules implementing the Synar Amendment, the federal Department of Health and Human Services chose to "allow the States flexibility to determine which strategies are most appropriate for meeting the compliance target and enforcement requirements of the law and the regulation." *Tobacco Regulation for Substance Abuse Prevention and Treatment Block Grants*, 61 Fed. Reg. 1492, 1495 (1996); *see also* 45 C.F.R. § 96.130.

B. The Federal Aviation Administration Authorization Act of 1994.

In 1978, Congress enacted the Airline Deregulation Act ("ADA"), Pub. L. No. 95-504, 92 Stat. 1705, which largely deregulated domestic air transport, and included a preemption clause to ensure that states not "undo federal deregulation with regulation of their own."[1] *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 378 (1992). Because the reach of the ADA had been found to preempt state economic regulation of the transport of property by air carriers, *Federal Express Corp. v. California Public*

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[1] The preemption provision of the ADA read in pertinent part:

> No State . . . shall enact or enforce any law, rule, regulation, standard, or other provision having the force and effect of law relating to rates, routes, or services of any air carrier. . . .

Former 49 U.S.C. § 1305(a)(1). Reenacting Title 49 of the U.S. Code in July of 1994, Congress revised this clause to read:

> [A] State . . . may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier. . . .

49 U.S.C. § 41713(b)(1). "Congress intended the revision to make no substantive change. Pub. L. 103-272, § 1(a), 108 Stat. 745." *American Airlines, Inc. v. Wolens*, 513 U.S. 219, 223 n.1 (1995).

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Utilities Commission, 936 F.2d 1075, 1078 (9th Cir. 1991), *cert. denied,* 504 U.S. 979 (1992), but not motor carriers, just two years after the Synar Amendment Congress enacted the FAAAA to extend to motor carriers that same level of preemption. H.R. Conf. Rep. No. 103-677, at 83, 87 (1994), *reprinted in* 1994 U.S.C.C.A.N. 1715, 1755, 1759. The conferees intended no change in the substantive law, and aimed to apply the "identical" preemption under the ADA uniformly to air and motor carriers. *Id.*

In its findings, Congress explained that "certain aspects of the State regulatory process should be preempted." Pub. L. No. 103-305, Title VI, § 601(a)(1) & (2), 108 Stat. 1569, 1605. Congress enacted two preemption provisions, while retaining the general air carrier preemption section found at section 41713(b)(1). The first read that "[e]xcept as provided in subparagraph (B), a State . . . may not enact or enforce a law . . . related to a price, route, or service of an air carrier . . . when such carrier is transporting property by aircraft or by motor vehicle." Pub. L. No. 103-305, Title VI, § 601(b)(1), 108 Stat. 1569, 1605, codified at 49 U.S.C. § 41713(b)(4)(A). Subparagraph (B), entitled "Matters not covered," provided that preemption would not restrict state regulations covering safety, hazardous cargo, insurance or household goods. *Id.*, codified at 49 U.S.C. § 41713(b)(4)(B).

In order to accomplish the goal of placing air and ground carriers on the same economic footing, Congress enacted another subsection entitled, "Preemption of State *Economic* Regulation of Motor Carriers." Pub. L. No. 103-305, Title VI, § 601(c), 108 Stat. 1569, 1606 (emphasis added). This new subsection is identical in effect to that covering air carriers, proscribing states from enacting or enforcing laws "related to a price, route, or service of any

motor carrier . . . with respect to the transportation of property." *Id.*, originally codified at 49 U.S.C. § 11501(h)(1), now codified at 49 U.S.C. § 14501(c)(1). The exemptions from preemption for motor carriers included the same list of matters exempted for air carriers. *Id.*, originally codified at 49 U.S.C. § 11501(h)(2), now codified at 49 U.S.C. § 14501(c)(2).[2]

C. The Maine Tobacco Delivery Law.

According to the American Lung Association, Maine leads the nation in tobacco control, and received perfect grades the last two years for, *inter alia*, restriction of youth access. *American Lung Association – State of Tobacco Control: 2006*, at 94-95.[3] As early as 1983, Maine enacted a ban on the sale or furnishing of tobacco to children. Me. Pub. L. 1983, c. 239, now codified at 22 Me. Rev. Stat. § 1555-B(1) & (2) (a person "may not sell, furnish, give away or offer to sell, furnish or give away a tobacco product to any person under 18 years of age," and may not sell "to any person under 27 years of age unless

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[2] Congress also included on the list of exemptions for motor carriers certain "State standard transportation practices" regarding uniform liability, bills of lading, credit rules and antitrust laws if the carrier requests that the state law apply to it. Pub. L. No. 103-305, Title VI, § 601(c), 108 Stat. 1596, 1606, originally codified at 49 U.S.C. § 11501(h)(3), now codified at 49 U.S.C. § 14501(c)(3).

Just one year after its enactment, section 11501(h) was recodified at 49 U.S.C. § 14501(c), adding state regulation of nonconsensual tow rates to the list of exemptions. Interstate Commerce Commission Termination Act of 1995, Pub. L. No. 104-88, § 103, 109 Stat. 899. The tow rate exemption is now found at section 14501(c)(2)(C).

[3] This report is available at: <http://www.mainelung.org/Topics/documents/Full_Report.pdf> (visited August 19, 2007).

the seller first verifies that person's age by means of reliable photographic identification containing the person's date of birth").

There is no dispute that Internet and telephone tobacco retail transactions are a serious problem. Pet. App. 3, 40. By means of delivery services, enterprising retailers seek to avoid over-the-counter age verification requirements by selling tobacco products to minors and delivering the tobacco not over-the-counter but rather over-the-doorstep using third-party carriers such as UPS. In response to this dangerous practice, in 2003 the Maine Legislature passed "An Act To Regulate the Delivery and Sales of Tobacco Products and To Prevent the Sale of Tobacco Products to Minors," Me. Pub. L. 2003, c. 444. Pet. App. 3.

The Act requires retailers engaged in delivery sales of tobacco to Maine citizens to obtain a retail license from the Maine Department of Health and Human Services just as over-the-counter retailers must. 22 Me. Rev. Stat. §§ 1551-A, 1555-C(1). Similarly, the Act requires the Internet or telephone tobacco retailer to obtain age verification at the time of the order just as over-the-counter retailers must do for persons under 27 years of age. *Id.* at §§ 1555-B(2), 1555-C(2).

At an over-the-counter sale, the clerk sees, verifies the age of, and hands the tobacco over to the purchasing customer. The order, payment and "delivery" over-the-counter happens in person and at the same time, allowing the clerk to make sure that the customer to whom she is furnishing tobacco is not a child. In delivery sales, the order and payment are separated in both time and location from "delivery." In order to ensure that the same sort of

safeguards that protect children apply in delivery sales, the Maine Legislature enacted section 1555-C(3)(C), which calls for tobacco retailers to utilize a delivery service that requires (1) the purchaser to be the addressee, (2) the addressee to be of legal age to purchase tobacco products and sign for the package, and, (3) if the addressee is under 27 years old, to present a valid identification showing proof of age.[4] The purpose is to have the retailer ensure that the same sort of age verification safeguards are used when tobacco is handed over-the-doorstep as are used when it is handed over-the-counter. The addressee-signature provisions require delivery retailers to ensure the over-the-doorstep delivery is to the purchaser, thus preventing, *inter alia,* efforts by children to purchase tobacco. These provisions regulate retailers, *not carriers.* Tobacco products shipped in violation of these requirements are contraband, subject to forfeiture. *Id.* at § 1555-C(7).

To ensure the fulfillment of the tobacco-retailer licensing requirement, section 1555-D of the Act proscribes the "knowing" delivery of tobacco products unless the sender or recipient has a Maine license. The provision applies to any person transporting or delivering tobacco products in Maine, a category that includes but is not limited to carriers covered by the FAAAA, such as UPS. A separate provision of the Act requires the delivery sale retailer to "clearly mark the outside of the package . . . to

[4] Section 1555-C(3)(A) requires the tobacco retailer, prior to shipping, to provide to the delivery service the age of the purchaser. Respondents unsuccessfully challenged this provision below. Pet. App. 66. However, as recognized by the district court, without the preempted provisions, this section serves no purpose. *Id.*

indicate that the contents are tobacco products and to show the name and State of Maine tobacco license number of the . . . retailer." *Id.* at § 1555-C(3)(B). Maine adopted rules for the enforcement of this law that require, *inter alia*, the retailer to mark the label side of the package with a tobacco marking, and do not require a delivery service to look at the bottom of a package for tobacco markings. 10-144-203 Me. Code. R. §§ 10(C)(2), 11. The second sentence of section 1555-D provides that a "person is deemed to know a package contains tobacco if the package" is marked in that fashion or if it is received "from a person listed as an unlicensed tobacco retailer by the Attorney General." Maine maintains a list of licensed and known unlicensed retailers, and provides the list to delivery services. Reliance on that list is an affirmative defense. 22 Me. Rev. Stat. § 1555-D(3) & (4). Transgressions are civil violations punishable by fines of $50 to $1500, and the Attorney General may enforce the law by seeking injunctive relief. *Id.* at § 1555-D(2) & (3).

II. Operative Facts.

Respondents are non-profit trade associations whose members are engaged in the commercial delivery of packages containing property. Before the district court, Respondents proceeded on the theory that Maine's law was preempted so long as a *single* carrier did not provide the services contemplated by the law. Respondents relied entirely upon the experience of UPS to meet their burden of demonstrating the unlawful effects of the law, and presented no evidence regarding other carriers or the industry as a whole.

UPS uses a "hub-and-spoke" system, which consists of an extensive network of sorting facilities throughout the country that generally works as follows: the person or entity shipping the package provides delivery information on UPS's shipping form or though an electronic shipping system; the package enters UPS's system through a driver pick-up (including pick-ups from the shipper, an outlet such as a UPS Store or a UPS drop box), or through UPS's customer counter; the driver brings the package to a local operating center; the package is unloaded and placed on conveyor belts for sorters to separate based on delivery location and the delivery time commitment; feeder vehicles and, in some cases, airplanes and trains take the package from the centralized hub to another hub for further sorting, and ultimately to a local center for delivery; and at the local center the package is further sorted and loaded onto a vehicle for delivery based on the recipient's address.[5] The driver who delivers the package checks specific delivery information, such as the need for age verification or a signature, on a hand-held computer device (a "DIAD").[6]

Ordinarily, and prior to the Maine Act, all sides of the exterior of packages were visually scanned at many stages through the distribution process for, *inter alia,* labels, signs of damage, improper packaging, leakage, prohibited contents and hazardous waste markings by various UPS employees such as sorters, presorters and drivers.[7] *See,*

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[5] Joint Appendix (JA) 68-69, 100-02.

[6] JA 101-02; *Meisel Dep.*, at 142:4-18, 208:8-12; *George Dep.*, at 76:14-77:11.

[7] JA 98-100; *Meisel Dep.*, at 213:13-270:10 and Exhibit 13 (JA 32-38). Respondents generally qualified or disputed that UPS's

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e.g., Meisel Dep. Exhibit 13 (JA 32-38) (reproducing a package showing UPS workers who typically "visually scan" each side).

UPS previously implemented written procedures and policies relating to the delivery of substances such as alcohol and handguns, which, *inter alia,* require that the shipper and/or recipient be licensed.[8] In response to the Maine Act, UPS instructed certain of its employees in Maine to look for markings indicating that a package contained tobacco products.[9] According to UPS, the preloaders and drivers were instructed to treat any such package as non-deliverable, and to give that package to a designated employee who assesses how to proceed, including returning the package to the sender or disposing of the package.[10] At the same time, however, UPS continued to deliver tobacco to licensed entities in Maine.[11]

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employees in fact looked at all sides of a package during the sorting and delivery processes, suggesting at times that UPS employees only looked at labels. JA 111-13. A review of the deposition testimony, however, does not support Respondents' objections and qualifications. *Meisel Dep.*, at 31:5-20, 49:1-7 ("Additionally, [the UPS loader] may be looking for additional markings on the exterior of the package to ensure that the package is meeting requirements."), 54:17-18 ("[The preloader] would also be looking for markings on the package."), 68:11-18, 101:15-102:5, 103:21-104:17, 213:13-270:10, Exhibit 13 (JA 34, 36, 37); *George Dep.*, at 70:3-72:4 ("Q. And would [the UPS counter clerk] look at all sides of the box? A. They should when they are inspecting the packaging, yes."); *Butler Dep.*, at 35:13-36:22.

[8] JA 107-08; *see also* UPS, *Terms and Conditions of Contract*, at 25, <http://www.ups-scs.com/tools/terms/air_tc.pdf> (visited August 19, 2007).

[9] JA 104-05.

[10] *Id.*

[11] JA 92-93.

A UPS employee estimated that it takes a preloader an additional two seconds to visually scan (*i.e.*, look at) the label of a package for tobacco indicia.[12] Based upon this estimate, the UPS employee provided a cost figure for Maine, amounting to approximately $0.009, or less than one cent, per package.[13] UPS claims it did no other study or analysis to quantify what additional time a driver would spend complying with the Maine Act, or what the effect of the Maine Act is on its package sorting or delivery rate. Pet. App. 28 n.14, 51-52 nn.54-55, 65 n.92.[14]

UPS delivers approximately 65,000 packages per day in Maine. During a five-month period, UPS intercepted a total of 33 packages that its workers believed contained tobacco products destined for Maine consumers.[15] UPS alleged that it costs approximately $2.00 in personnel time to deal with each such package.[16] Thus, according to UPS, for a five month period in 2003 there was an additional $66 in costs to UPS to comply with the Maine Act. UPS's total revenue in 2003 was $33.5 billion.[17]

As noted, at the time of each and every delivery, the UPS driver checks and enters delivery information on a hand-held computer device ("DIAD").[18] According to UPS,

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[12] JA 104; *Butler Dep.*, at 5:18-7:17, 88:2-89:7, Exhibit 8.

[13] JA 108; *Butler Dep.* at 88:24-89:25, 91:10-92:1, Exhibit 8.

[14] *See also* JA 105, 107; *Meisel Dep.*, at 149:8-151:8 ("You asked me a question on have we [UPS] studie : what the cost would be to a driver, no, we haven't studied it."), 194:13-22.

[15] JA 106.

[16] *Id.*

[17] JA 105.

[18] JA 101-02; *Meisel Dep.*, at 142:4-18, 208:8-12; *George Dep.*, at 76:14-77:11.

its computer system "is probably capable of doing pretty much anything."[19] It is the second largest computer system in the world.[20] The DIAD has the capability and does provide relevant prompts or "alerts" regarding each package when delivered.[21] These "alerts" inform the driver, *inter alia*, whether a signature or adult confirmation is required.[22] UPS has the capability to flag specific delivery addresses or specific consignees to generate an alert, and the DIAD can be programmed to generate a prompt for a particular shipper to direct the driver's behavior.[23]

UPS offers a delivery-confirmation, adult-signature-required service for an additional fee of as much as $2.75.[24] When a driver delivers a package pursuant to its delivery-confirmation or adult-signature-required service, she receives a prompt on her DIAD to have her verify the age of the person receiving the package or obtain a signature.[25] This service is profitable.[26] Under UPS's preexisting standard operating procedures, if any delivery (be it general, "signature required," or "adult signature required") cannot be made for whatever reason after three attempts, the UPS delivery person leaves a notice at the

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[19] JA 106; *Meisel Dep.*, at 274:12-275:10.

[20] *Transcript of Proceedings of March 29, 2004*, at 21-22 (U.S.D.Ct.).

[21] JA 101.

[22] *Id.*

[23] JA 101-02.

[24] JA 102; *Meisel Dep.*, at 176:14-17, 179:15-25. *See also* UPS, *Delivery Confirmation*, <http://www.ups.com/content/us/en/shipping/time/service/value_added/delivery.html> (visited August 19, 2007).

[25] JA 102.

[26] *Id.*; *Meisel Dep.*, at 179:15-25.

place of delivery and returns the package to the local UPS facility for pickup by the recipient within five days.[27]

Respondents asserted that section 1555-C(3)(C), which requires a retailer to use a carrier with an *addressee*-signature and age-verification service, would require UPS to change its preexisting *recipient*-signature and age-verification service delivery procedures. UPS's website does not distinguish between a "recipient" and an "addressee" for purposes of this service.[28] According to UPS, a service requiring an addressee's signature would take extra time but UPS nowhere quantified what the additional cost would be per package, assuming there was a difference between the two. Nor did Respondents present any evidence that other carriers did not already or would not provide an addressee-signature and age-verification service.

The State provided UPS with an electronic version of its list of known unlicensed tobacco retailers who may be attempting to unlawfully ship tobacco to Maine consumers, but UPS asserts it has not researched whether any of its regular shippers are on the state list of unlicensed tobacco retailers.[29] As noted, however, UPS stated it continued to deliver tobacco to licensed entities in Maine

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[27] *George Dep.*, at 59-60; *Butler Dep.*, 84-86. There is no extra charge for this return procedure, which appears to be built into the cost of standard, recipient signature, and adult-recipient-signature services. UPS, *Learn About the UPS InfoNotice*, <http://www.ups.com/content/us/en/tracking/help/tracking/infonotice.html> (visited August 19, 2007).

[28] According to UPS's website, the recipient is the person or entity that the shipper places on the label. UPS, *How to Prepare for Shipping*, <http://www.ups.com/content/us/en/resources/prepare/guidelines/prepare_package4.html> (visited August 19, 2007).

[29] JA 106.

after the Act became law. UPS has over 4,000 employees in the technology and information systems area but claims it did no study of the capability of the system regarding compliance with the Maine Act.[30]

During the pendency of the appeal before the First Circuit (and apparently in response to unfavorable FAAAA and Commerce Clause decisions elsewhere),[31] UPS entered into a settlement with New York to comply with that state's "Unlawful Shipment of Cigarettes Law," N.Y. Pub. Health Law, § 1399-*ll*, by stopping delivery nationwide of cigarettes to consumers. *Assurance of Discontinuance*.[32] UPS agreed, *inter alia*, to impose measures to ensure that employees "actively look[] for indications that a package contains Cigarettes," and to instruct employees not to deliver cigarette packages to consumers. *Id.*, at ¶¶ 35, 36. UPS also agreed to: require its shippers to be licensed by applicable law in order to ship tobacco products, incorporate into its computer system information about cigarette retailers, and accept shipments of cigarettes for delivery only to recipients who are licensed. *Id.*; *Report Regarding UPS's Compliance with the Assurance of Discontinuance*,

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[30] JA 105, 107.

[31] *Brown & Williamson Tobacco Corp. v. Pataki*, 320 F.3d 200 (2d Cir. 2003) (State law banning delivery of cigarettes to consumers did not violate Commerce Clause); *New York State Motor Truck Assoc. v. Pataki*, 2004 U.S. Dist. Lexis 25519 (S.D. N.Y. 2004) (State law banning delivery of cigarettes to consumers not preempted by the FAAAA); *Ward v. New York*, 291 F. Supp. 2d 188 (W.D. N.Y. 2003) (same).

[32] Found at <http://www.oag.state.ny.us/press/2005/oct/9tiupsaodfinal.oct.pdf> (visited August 19, 2007).

at ¶¶ 1, 8, 10.[33] FedEx and DHL have entered into similar agreements with New York.[34]

III. Proceedings Below.

Respondents commenced this action in the United States District Court for the District of Maine to challenge sections 1555-C(3)(A) and (C) and 1555-D of the Maine Act as preempted facially and as applied by the FAAAA. The district court initially denied Respondents' and granted the State's motion for summary judgment on the facial challenge, Pet. App 73, 86, but then reversed its course and ruled that section 1555-C(3)(C) and 1555-D were preempted by the FAAAA both facially and as applied. Pet. App. 31.

The First Circuit affirmed.[35] Pet. App. 1. The court of appeals broadly held that the FAAAA "preempts state police-power enactments" to the extent they have "the effect of forcing [a carrier] to change its uniform package-processing procedures," and that the purpose of the state law is irrelevant to the preemption inquiry. Pet. App. 17-18, 21, 28. It gave a broad reading to the FAAAA based upon its interpretation of *Morales v. Trans World Airlines,*

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[33] Reproduced in the addendum to the Attorney General's Reply Brief before the First Circuit, at A-21-A-26.

[34] Those agreements can be found at: <http://www.oag.state.ny.us/press/2006/feb/FedEx%20-%20Executed%20AOC.pdf> (visited August 19, 2007); and <http://www.oag.state.ny.us/press/2005/jul/dhlaogfinal.pdf> (visited August 19, 2007).

[35] Below, the Attorney General sought dismissal of the action on the grounds of mootness and lack of associational standing. The court of appeals rejected those positions. Pet. App. 7-12. The Attorney General no longer presses these arguments.

Inc., 504 U.S. 374, 378 (1992), and specifically declined to apply this Court's approach towards interpreting similar preemption language under ERISA. *Id.* at 16, 19-21.

The court of appeals found section 1555-C(3)(C) was preempted because it "references" carrier services and is "related to" a carrier's service due to the potential for delay if a carrier chose to provide such options. Pet. App. 23. Although the provision applies only to retailers, the court reasoned it indirectly regulated carriers by "employing [the state's] coercive powers to police the method by which carriers provide services in the state." Pet. App. 24. According to the court of appeals, Maine's only option was to entirely ban retailers from shipping tobacco into Maine. *Id.* at 26-27.

The First Circuit found that so much of section 1555-D that proscribed "knowing" delivery of tobacco for an unlicensed retailer was not preempted. Pet. App. 26. Yet, the court of appeals went on to conclude that the second sentence of section 1555-D was preempted insofar as it charged carriers with knowledge that a package contains tobacco products based on tobacco markings and labels. *Id.* at 27-28. According to the First Circuit, Maine could theoretically implement a ban and prosecute a carrier for "knowing delivery" of contraband tobacco, but Maine could not impute knowledge "based on a failure to read labels or consult lists, an imputation which would amount to prescribing how carriers must operate" because to do so would require a carrier to inspect the package and, thereby, change its uniform practices. *Id.* at 28-29. The court of appeals conceded there was "potential tension" in its decision because "as a practical matter, [it] may be difficult to prove" a case against a carrier if knowledge cannot be imputed from information on the outside of the

package. *Id.* In reality, without use of such evidence, it is not possible to enforce a ban on delivery of contraband against a carrier.

SUMMARY OF THE ARGUMENT

Maine has the sovereign authority to protect its children by regulating how dangerous substances may be delivered in the state. That authority is preempted only if the congressional intent to do so is clear and manifest. No one reasonably believes that state bans on the delivery of tobacco or other dangerous substances to children or on the delivery of contraband is preempted by the FAAAA language "related to." Although such bans literally are "related to . . . service[s]" of a carrier, there is no support in the FAAAA or common sense for such a result. The dispute here is over the subsidiary laws that implement state public health bans: laws requiring retailers to use a delivery service that has age verification and signature options that duplicate the safeguards at over-the-counter sales, and laws that make clear that a delivery service can be prosecuted using markings and labels on the package which is the best, if not only, evidence available. While the same reasons that make clear that a ban is not preempted apply fully to the implementing legislation, the court of appeals, Respondents, and the United States abandon them. Instead, they apply an overly-broad if not literal reading of "related to," relying upon a crabbed view of prior ADA cases and ignoring the stated objectives of the FAAAA, to produce an impractical and problematic result.

The preemptive language "related to," of course, is unhelpful and relatively meaningless, as this Court's

ERISA cases tell us. This is particularly so because the consequences of applying it as the court of appeals did prevent effective implementation of the ban on furnishing tobacco to children by means of delivery sales. The court of appeals' heavy reliance upon *Morales* is misplaced because it involved clear, direct economic regulation of airlines. Most importantly, the Court cautioned against reading too much into that case, and specifically stopped short of applying ADA preemption to gambling, prostitution and obscenity – all public health in nature. Therefore, the Court finds itself very much at the same place regarding the FAAAA as it did with ERISA when it decided *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Insurance Co.*, 514 U.S. 645 (1995). Just as in the ERISA cases, resort must be had to the objectives of the underlying statute. Consideration of those objectives leads to the conclusion that public health delivery laws, particularly regarding youth access to tobacco, are not preempted by the FAAAA.

The FAAAA was intended only to apply to motor carriers the same level of preemption previously enjoyed by air carriers – freedom from state economic regulations that interfered with competition for markets. At the time, there were myriad state public health delivery laws banning and controlling the delivery of everything from alcohol to wild animals. There is no suggestion anywhere that this was the type of state law Congress intended to supercede. A proposal to eliminate them would never have passed, particularly regarding tobacco in light of the Synar Amendment which specifically encouraged states to enact and enforce laws to stop the sale and distribution of tobacco to minors.

Just as a ban on the delivery of tobacco to minors does not interfere with the objectives of the FAAAA, so section 1555-C(3)(C) does not either and therefore has no "connection with" carrier services. It is similar to public health laws on the books at the time of the FAAAA, and there is no suggestion such laws were to be preempted. Similar to a ban preventing delivery of illegal narcotics or certain dangerous items, a law requiring retailers to deliver such items in a particular fashion does not skew competition. Any carrier can openly compete for the legal tobacco delivery market or not. Because section 1555-C(3)(C) does not apply to carriers, it has no "reference to" their services; and, in any case, whatever effects there may be apply to all delivery services, of which carriers are but a subset. Finally, because Congress would not have preempted tobacco delivery laws if such a proposal had been made, resort to the "acute," indirect effects inquiry is unnecessary. Under that inquiry, moreover, section 1555-C(3)(C)'s effects are not so acute as to force a carrier to compete or not for the legal tobacco delivery market.

As to section 1555-D, the First Circuit upheld that portion of the provision that banned motor carriers from knowingly delivering contraband tobacco, and Respondents did not cross-petition from that holding. Accordingly, Respondents must concede that that part of section 1555-D is not preempted by the FAAAA. But the best and only manner to enforce that ban is to take the person who violated it – the delivery service – to court. And the best, and so far only identified, evidence to prove a case of delivery of unlicensed tobacco or tobacco to a child is the markings or labels on the package. The second part of section 1555-D identifies the ordinary evidence from which a delivery service discerns that a package contains tobacco

or is unlicensed. The court of appeals' decision prevents Maine from using that sort of evidence because it would require UPS to change its uniform procedures in order to look for and do something about a package with tobacco markings or labels on it before delivering contraband. Neither the appeals court, Respondents, nor the United States address this practical problem, which has the effect of immunizing carriers from state public health delivery laws.

Congress did not evince any intent to prevent the longstanding use of such evidence against those who illegally deliver contraband. Imputing knowledge has no "connection with" carrier services because it does not interfere with the objectives of the FAAAA to promote competition among carriers – it applies to all delivery services equally. And, because this provision applies to all delivery services of which carriers are a subset, likewise it has no "reference to" carrier services. Finally, Respondents failed to carry their heavy burden of proof that the Maine Act has an indirect, acute prohibited effect on them. The indirect effect on carriers is to prevent them from delivering contraband and dangerous substances to children, which by no account can be considered prohibited under the FAAAA.

ARGUMENT

I. THE COURT SHOULD LOOK BEYOND THE "RELATED TO" LANGUAGE OF THE FAAAA TO ITS OBJECTIVES IN ORDER TO DETERMINE IF CONGRESS INTENDED TO PREEMPT STATE LAWS BANNING THE SALE AND DELIVERY OF DANGEROUS SUBSTANCES AND STATE LAWS THAT IMPLEMENT THEM.

A. The ERISA Cases Teach That The Term "Related To" In A Preemption Provision Cannot Be Literally Applied, But Must Instead Be Construed Based On The "[O]bjectives of the . . . [S]tatute."

Controlling the sale and distribution of tobacco to ensure it does not end up in the hands of children is established federal and state policy, endorsed at every level and by every branch of government. All 50 States make it unlawful to sell tobacco products to minors. These bans naturally apply to sales by all means – whether face-to-face at a retail outlet, through the U.S. mail, or through a carrier covered by the FAAAA. It could not be otherwise. The terrible impact on a child's health is the same whether the child is furnished the tobacco over-the-counter in face-to-face sales or over-the-doorstep from a delivery person as a part of Internet or telephone sales. Yet it is certainly possible to view those state laws as "related to" a carrier's "service." State bans on shipping tobacco to minors (and contraband such as illegal narcotics to anyone), and those laws that implement such bans, prevent carriers such as UPS from delivering certain types of goods or require them to be shipped in only a particular fashion. These laws eliminate a specific "service" the carriers might otherwise

have provided – delivery of contraband tobacco – and therefore literally are "related to" carrier services.

The ERISA preemption cases beginning with *Travelers*, however, teach that the term "relate to" cannot be read literally. In *Travelers*, the Court recognized that the term "relate to" is "unhelpful" and "frustrating," and cannot be taken "to extend to the furthest stretch of its indeterminacy," or else "for all practical purposes pre-emption would never run its course." 514 U.S. at 655, 656; *see also California Div. of Labor Standards Enforcement v. Dillingham Constr., N.A.*, 519 U.S. 316, 325 (1997); *id.* at 335 (Scalia, J., concurring). Instead, the Court reasoned that it had to "go beyond the unhelpful text and the frustrating difficulty of defining [ERISA's] key term, and look instead at the objectives of the ERISA statute as a guide to the scope of the state law that Congress understood would survive." *Travelers*, 514 U.S. at 656.

B. The FAAAA's "Related to" Provision Should Likewise Be Construed Based On The "[O]bjectives of the . . . [S]tatute."

The same common sense applies to the FAAAA. At the time of the enactment of the FAAAA, Maine, like other states, had numerous and longstanding bans and controls on the delivery of various substances, from alcohol to wild animals.[35] A literal reading of "related to" effectively

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[35] *See, e.g.*, 28-A Me. Rev. Stat. §§ 2073, 2077, 2081, originally enacted in 1987, Me. Pub. L. 1987, c. 45, § A, 4 (liquor transportation provisions, and prohibiting furnishing, delivering, or giving liquor to a minor); former 12 Me. Rev. Stat. § 12351, originally enacted in 1979, Me. Pub. L. 1979, c. 420, § 1 ("Any common carrier accepting wild animal or wild bird for transportation shall" check the hunter's license,

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eliminates all of them to the extent the contraband is delivered by carriers covered by the FAAAA. A ban on the delivery of tobacco (or any of the myriad other bans on the sale and delivery of contraband)[37] literally is "related to" a carrier's "service" because it prevents a carrier from delivering a particular item in Maine.

Inquiry beyond the words "related to" is particularly called for here because the federal government does not regulate the sale and distribution of tobacco by means of delivery sales or otherwise. Rather, in enacting the Synar Amendment, Congress explicitly encouraged the states to use their public health powers to pass laws against the sale and distribution of tobacco to children without any limitations or directives regarding uniformity. It cannot be seriously contended that Congress, just two years after enacting the Synar Amendment, intended to create a vast loophole by preempting all state laws that make it illegal to deliver tobacco to minors via carriers covered by the FAAAA. The regulatory void created by the strict reading of "related to" by the court of appeals is at the very least "unsettling," demanding inquiry into the objectives behind those words. *Travelers*, 514 U.S. at 655; *United States v.*

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affix tags and identification, and make returns to the commissioner); 8 Me. Rev. Stat. §§ 221, *et seq.*, enacted by Me. Pub. L. 1985, c. 23, § 2 (prohibiting possession, sale or transport "in any conveyance" of fireworks "except as permitted by" state regulations); 17-A Me. Rev. Stat. § 1001(1)(B), enacted by Me. Pub. L. 1975, c. 499, § 1 (prohibiting transport or sale of explosives without a permit); 7 Me. Rev. Stat. § 3981, enacted by Me. Pub. L. 1987, c. 383, § 3 (regulating periods of confinement and conditions for transportation of animals); 12 Me. Rev. Stat. §§ 8305-06, originally enacted by Me. Pub. L. 1979, c. 545, § 3 (prohibiting and regulating shipment of plants and trees).

[37] *Id.*; *see also* 17-A Me. Rev. Stat. § 1118 (transporting scheduled drugs); 17-A Me. Rev. Stat. § 554-B(2) (transferring handgun to minor).

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American Trucking Ass'ns, 310 U.S. 534, 542-43 (1940) (plain meaning of a statute is not applied when the results are absurd or "plainly at variance with the policy of the legislation as a whole.")

Finally, as explained in *Travelers*, a literal reading of the term "related to" would "read the presumption against pre-emption out of the law whenever Congress speaks to the matter with generality." 514 U.S. at 655. That concern holds particular force here, because the Maine Act and the Synar Amendment have a "common purpose" in preventing youth access to tobacco. Accordingly, the Maine Act is protected by a particularly strong presumption against preemption. *See Pharmaceutical Research & Mfrs. of Am. v. Walsh*, 538 U.S. 644, 666 (2003) (the presumption "has special force when it appears . . . that the two governments are pursuing 'common purposes,'" quoting *New York State Dept. of Social Servs. v. Dublino*, 413 U.S. 405, 421 (1973)). Of course, that is on top of this Court's general recognition that "the historic police powers of the State include the regulation of matters of health," so that "Respondents . . . bear the considerable burden of overcoming the starting presumption that Congress does not intend to supplant state law." *De Buono v. NYSA-ILA Medical and Clinical Servs. Fund*, 520 U.S. 806, 814 (1997) (internal citation and quotation marks omitted); *see also City of Columbus v. Ours Garage and Wrecking Service, Inc.*, 536 U.S. 424, 438 (2002) (applying the presumption in an FAAAA preemption case). All told, this Court should apply a methodology similar to this Court's approach to ERISA's "relate to"

preemption provision to the FAAAA's "related to" preemption provision.[36]

C. *Morales* and the Conferees' Reference Thereto Do Not Require The Court To Forego Consideration Of The Objectives Of The FAAAA.

The First Circuit held that the logic of the ERISA cases beginning with *Travelers* was inapposite to FAAAA preemption because "'the conferees [did] not intend to alter the broad preemption interpretation adopted by the United States Supreme Court in *Morales* [*v. TWA*, 504 U.S. 374 (1992)].'" Pet. App. 15 (quoting H.R. Conf. Rep. No. 103-677, at 83, *reprinted in* 1994 U.S.C.C.A.N. 1715, 1755). According to the court of appeals, any post-*Morales* refinement in the meaning of the term "relate to" is irrelevant because Congress fossilized *Morales* into the bedrock of the FAAAA. Pet. App. 15-20. This reasoning misreads *Morales* as well as the conferees' intent when referring to it.

1. In *Morales*, the Court applied ERISA's two-pronged "reference to" and "connection with" methodology to assess whether the ADA preempted state guidelines applying state unfair trade practices laws to airfare

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[36] Not surprisingly, then, lower courts other than the First Circuit have looked beyond the words "related to" when applying the FAAAA's preemption provisions. *See Ace Auto Body & Towing, Ltd. v. City of New York*, 171 F.3d 765 (2d Cir. 1999); *Californians for Safe & Competitive Dump Truck Transp. v. Mendonca*, 152 F.3d 1184, 1187-88 (9th Cir. 1998), *cert. denied*, 526 U.S. 1060 (1999); *Ward*, 291 F. Supp. 2d at 208-11; *Robertson v. State of Washington Liquor Control Board*, 10 P.3d 1079 (Wash. Ct. App. 2000).

advertising. Although established pursuant to the states' police powers, the guidelines were economic in nature, directly regulating how airlines could advertise their prices and services, and were not in any way public health laws. The guidelines were found to have a "reference" to airfares for the obvious reason that they rested entirely upon airfares and "establish[ed] binding requirements as to how tickets may be marketed if they are to be sold at given prices." 504 U.S. at 388. Additionally, under the "connection with" prong, the Court found "as an economic matter that the state restrictions on fare advertising have the forbidden significant effect upon fares" because the guidelines had "a significant impact upon the airlines' ability to market their product." *Id.* at 388-90. *Morales,* therefore, presents a clear case involving economic guidelines requiring all airlines to market virtually all of their prices and services in a particular fashion, directly contravening the objectives of the ADA.

Most importantly, rather than foreclosing further refinement of preemption analysis under the ADA on a case-by-case basis, *Morales* expected and predicted it. The Court cautioned that it was not "set[ting] out on a road that leads to pre-emption of state laws against gambling and prostitution as applied to airlines. Nor need we address whether state regulation of the nonprice aspects of fare advertising (for example, state laws preventing obscene depictions) would similarly 'relate to' rates; the connection would obviously be far more tenuous." 504 U.S. at 390. Under *Morales,* a state would be free to regulate the delivery of gambling or obscene material to children, and tobacco as well. The Court's "broad" interpretation of

the ADA's preemption provision, therefore specifically stopped short of encompassing public health laws.

> To adapt to this case our language in *Shaw*[*v. Delta Air Lines, Inc.*, 463 U.S. 85 (1983)], "some state actions may affect [airline fares] in too tenuous, remote, or peripheral a manner" to have pre-emptive effect. 463 U.S. at 100, n. 21. In this case, as in *Shaw*, "the present litigation plainly does not present a borderline question, and we express no views about where it would be appropriate to draw the line." *Ibid.*

504 U.S. at 390. Thus, the Court was not establishing a boundless preemptive scope to the ADA, and foretold that where the line would be drawn as to what is "tenuous, remote or peripheral" would depend upon the state law before it.

The Court reiterated its cautionary sentiment against boundless preemption in *American Airlines, Inc. v. Wolens*, 513 U.S. 219 (1995), which dealt with, *inter alia*, state economic laws regulating frequent flier miles, clearly covered by the ADA. The Court emphasized that in *Morales* "much more" than the mere "relating to" language "account[ed] for the ADA's preemption of the state regulation in question." *Wolens*, 513 U.S. at 224. In particular, stated the *Wolens* Court, *Morales* emphasized that false advertising by airlines is regulated by the federal Department of Transportation, *id.*, a situation much different than the one before the Court here where there is no federal regulation of delivery sales of tobacco. The *Wolens* Court concluded that, "while we adhere to our holding in *Morales*, we do not overlook that in our system of adjudication, principles seldom can be settled 'on the basis of one or two cases, but require a closer working out.'" *Id.*

at 234-35 (citations omitted); *see also Mendonca,* 152 F.3d at 1188-89.

The Court here is presented very much with the same situation as in *Travelers.* In the prior decisions on preemption under the ADA, "it had not been necessary to rely on the expansive character of [the statute's] literal language in order to find pre-emption." *De Buono,* 520 U.S. at 813. The Court now has the opportunity for the first time to assess Congress' preemption objectives under the ADA's companion in a case involving state public health instead of economic laws, and involving a subject matter (preventing children's access to tobacco) that Congress has left to the states. The Court should use the ERISA cases as a guide.

2. The conferees' reference to *Morales*, of course, is sandwiched between numerous statements that the problem the FAAAA was intended to resolve was state *economic* regulations that impact the "level playing field," with no mention of public health laws. H.R. Conf. Rep. No. 103-677, at 82, 83, 84, 87, 88 (1994), *reprinted in* 1994 U.S.C.C.A.N. 1754, 1755, 1756, 1759, 1760. The import of the reference to *Morales* is further clarified by the conferees' reliance upon another decision in their report. In particular, the conferees explained the need for the FAAAA arose out of the divergent state treatment of air carriers and motor carriers, referring to *Federal Express Corp. v. California Public Utilities Commission,* 936 F.2d 1075. H.R. Conf. Rep. No. 103-677, at 87, *reprinted in* 1994 U.S.C.C.A.N. 1715, 1759. There, the Ninth Circuit found that regulations of the California Public Utilities Commission were preempted by the ADA as applied to air carriers. That court explained that the broad preemptive language of the ADA "should be understood as allowing the state to

act in an area of non-economic regulation" because "despite the very broad and apparently all-inclusive language of the statute, common sense and common practice have forbidden that the statute be taken literally and have restricted its range." 936 F.2d at 1078. The ADA is "[i]nterpreted in terms of its purpose and in the context of other laws." *Id.* And, according to the federal Department of Transportation in its testimony on the bill that became the FAAAA: "Such a legislative solution would codify in law the Ninth Circuit FedEx decision, with one major difference. It would make that regulatory reform available to a much broader class of carriers." H.R. Subcomm. on Surface Trans. of the Pub. Works & Trans. Comm., *Hearing on State Motor Carrier Laws* (July 20, 1994) ("*House Hearing*") (Testimony of Frank E. Kreusi, Asst. Sec'y, D.O.T.)[39]

II. THE OBJECTIVES OF THE FAAAA WERE TO PREEMPT STATES' ECONOMIC REGULATION OF MOTOR CARRIERS AND TO PLACE THEM ON A "LEVEL PLAYING FIELD" WITH AIR CARRIERS, NOT TO PREEMPT STATES FROM BANNING OR REGULATING THE SHIPMENT OF DANGEROUS SUBSTANCES AND CONTRABAND.

1. The objective of the FAAAA was to foster competition among all carriers for the business of transport of

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[39] UPS testified that it was before the committee "because of" the *Federal Express* decision. *House Hearing* (Testimony of James A. Rogers, Vice Pres., Gov'tl Affairs, UPS), *supra*. Clearly, UPS knew the Ninth Circuit's opinion on state non-economic regulation, and said nothing to the committee suggesting that would be altered by the proposed law.

property by creating "as completely as possible the level playing field between air carriers . . . and motor carriers." H.R. Conf. Rep. No. 103-677, at 82 (1994), *reprinted in* 1994 U.S.C.C.A.N. 1715, 1754; *see also House Hearing* (Kreusi Testimony, D.O.T.), *supra*. Congress sought to accomplish that goal by preempting the states' economic regulation of motor carriers, so that the motor carriers would be treated exactly as the air carriers had been treated under the ADA. H.R. Conf. Rep. No. 103-677, at 82-85 (1994), *reprinted in* 1994 U.S.C.C.A.N. 1715, 1754-56.

Prior to the FAAAA, many states had a variety of economic entry and commodity controls that "related to. . . . service[s]," by protecting certain carriers and discouraging new applicants, therefore stifling competition. *Id.* at 86, *reprinted in* 1994 U.S.C.C.A.N. 1715, 1758. In particular, as identified at the congressional hearings, these problematic economic laws included: entry controls which required a carrier to obtain a state license to deliver property in general as well as specific commodities; state approval in order to change a service offering; and state limits on the number of customers a carrier may service within a state.[40]

At bottom, "[t]he problem to which the congressional conferees [for the FAAAA] attended was 'state *economic*

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[40] *House Hearing* (Rogers Testimony, UPS), (UPS "must . . . get state approval in order to change a service offering," and "could offer only those services that [the state] approved"); *id.* (Testimony of Larry S. Mulkey, Pres., Ryder Dedicated Logistics) (many states "limit the number of customers that we may serve at one time," or "require contract carriers to obtain separate authority for each customer that they serve.").

regulation.'" *City of Columbus,* 536 U.S. at 440 (emphasis in original); *see also Mendonca*, 152 F.3d at 1187. There is a clear distinction between the types of state laws that Congress intended to preempt and the ones at issue here: economic laws as opposed to public health laws. While both fall within a state's traditional police powers, the legislative history is overwhelmingly one-sided that the FAAAA was intended to preempt the former with no mention of the latter. The FAAAA's purpose was to preempt "the States' economic authority . . . 'not restrict' the preexisting and traditional police power over" safety, *City of Columbus,* 536 U.S. at 439, and logically public health as well. The proponents of the law as well as the conferees' report repeatedly and exclusively explained the problem was the various types of state "economic" laws limiting competition that regulated "intrastate prices, routes and services of motor carriers," typically "entry controls, tariff filing and price regulation, and types of commodities carried." [4] H.R. Conf. Rep. No. 103-677, at 86 (1994),

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[4] *Proponents*: The proponents, in particular, the Administration, the American Trucking Association, and UPS, asked Congress only for preemption of state *economic* regulation. *House Hearing* (Kreusi Testimony, D.O.T.) (economic regulation to be preempted dealt with such matters as entry controls, tariffs and rates); *id.* (Rogers Testimony, UPS) (UPS testified in favor of preemption of state "economic regulation," such as rates and entry restrictions); Sen. Subcomm. of the Comm. On Commerce, Science & Trans., *Hearings on the Interstate Commerce Commission* (July 12, 1994) (Testimony of Thomas V. Donahue, Pres. and Chief Exec., American Trucking Assoc.) (testified in favor of the preemption of "state economic regulation," advocating that it would allow "states to continue to regulate non-rate or economic entry factors" and "non-economic aspects of state regulation").

Conferees: H.R. Conf. Rep. No. 103-677, at 82 (purpose is to level the playing field "with respect to intrastate economic trucking regulation"), 84 (states may not use non-preempted regulatory authority "as a guise for continued economic regulation"), 87 ("State

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reprinted in 1994 U.S.C.C.A.N. 1715, 1758. The conferees' reference to "types of commodities" was concerned with state laws requiring carriers to obtain specific licenses for particular commodities, which were sometimes limited to retard competition. That, of course, is not what we have here: any delivery service can deliver tobacco in Maine, and all delivery services must comply with the same laws when doing so. Certainly, there is no hint that Congress intended that contraband under state law suddenly would become a "commodity" beyond the states' regulatory authority.

To the extent Congress was concerned with a "patchwork" of state regulations, the concern was limited to economic laws. State nonuniformity for nonpreempted state regulations was permitted and expected. *See City of Columbus,* 536 U.S. at 441 ("State could, without affront to the statute, pass discrete, nonuniform safety regulations"). So long as a state's nonpreempted authority was not used "as a guise for continued economic regulation," H.R. Conf. Rep. No. 103-677, at 84 (1994), *reprinted in* 1994 U.S.C.C.A.N. 1715, 1756, it was not preempted.

There is absolutely no suggestion in the legislative history that public health delivery laws in general or tobacco laws in particular would be preempted. As explained by the conferees, "[c]urrently [in 1994], 41 jurisdictions regulate, in varying degrees, intrastate prices, routes and services of motor carriers. The jurisdictions which do

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economic regulation . . . causes significant inefficiencies," and "preemption of State economic regulation could eventually yield $3-8 billion per year in savings"), 88 ("The purpose of this section is to preempt economic regulation by the States") (1994), *reprinted in* 1994 U.S.C.C.A.N. 1754, 1756, 1759, 1760.

not regulate are: . . . Maine. . . . ." H.R. Conf. Rep. No. 103-677, at 86 (1994), *reprinted in* 1994 U.S.C.C.A.N. 1715, 1758.[42] It is undisputed that at the time of the FAAAA's enactment Maine had a wide variety of public health laws restricting or banning deliveries of various items, *see* note 36, *supra,* and as understood and intended by the conferees, those types of laws therefore did not "regulate . . . prices, routes and services." For obvious reasons, no one ever suggested that the FAAAA would grant immunity to a carrier from a state law that generally banned delivery of a dangerous substance or preempt a state law that regulated how such a substance could be delivered, because if anyone had, the FAAAA as written never would have passed.

2. Under the approach of the ERISA cases, being on the list of exemptions from preemption is not determinative. ERISA's preemption provision likewise contains specific exceptions (for the regulation of insurance and criminal laws), and likewise states that the preemption provision applies "[e]xcept as provided in" the subsection containing the exceptions. ERISA §§ 514(a), 514(b)(2), 514(b)(4), 29 U.S.C. § 1144(a), (b)(2), (b)(4). Nevertheless, this Court has not read those exceptions as meaning that every *other* category of state law that might "relate to" ERISA plans is preempted. None of the state laws upheld in *Travelers*, *De Buono*, and *Dillingham* fit within the

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[42] The federal D.O.T. and representatives of the industry informed the committee that there were states with no problematic economic regulations. *House Hearing* (Kreusi Testimony, D.O.T.) ("Although nine States do not regulate trucking operations conducted wholly within their respective boundaries, 41 States do."); *id.* (Mulkey Testimony, Ryder) ("41 states still have arcane laws regulating entry, rates and services for intrastate trucking.").

exceptions. *De Buono*, 520 U.S. at 809 (state tax statute); *Dillingham*, 519 U.S. at 325 (state prevailing wage law); *Travelers*, 514 U.S. at 657-64 (state surcharge on bills of patients). The state laws were upheld because, based on Congress' objectives in enacting ERISA, they were "state law[s] that Congress understood would survive." *Travelers*, 514 U.S. at 656. With respect to the FAAAA preemption provision, the same is true of state contraband statutes.

In addition, the legislative history confirms that the conferees intended that the list of exceptions was not intended to be exclusive. The list was not proposed to diminish or expand the areas exempted under the ADA. H.R. Conf. Rep. No. 103-677, at 83 (1994), *reprinted in* 1994 U.S.C.C.A.N. 1715, 1755. It simply set forth some of the matters of the most but not exclusive concern, with the conferees specifically explaining: "This list is not intended to be all inclusive, but merely to specify some of the matters which are not 'prices, rates or services' and which are therefore not preempted." H.R. Conf. Rep. No. 103-677, at 84 (1994), *reprinted in* 1994 U.S.C.C.A.N. 1715, 1756 (emphasis added). The conferees reiterated that this list of exemptions was "partially identified." *Id.*[43]

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[43] The conferees also advised that the law should not be read to allow state regulation of "prices, routes and services . . . through its unaffected authority to regulate matters *such as*" those on the list. H.R. Conf. Rep. No. 103-677, at 84 (1994), *reprinted in* 1994 U.S.C.C.A.N. 1715, 1756. The list came about in part from Congress' paying specific attention to the American Trucking Association's position accepting "preemption of state regulation of motor carrier rates and entry based on economic factors," so long as "that would allow [state] regulatory protection to continue for non-economic factors, *such as*" the matters contained in the list. *Id.* at 88, *reprinted in* 1994 U.S.C.C.A.N. 1715, 1760 (emphasis added); *City of Columbus*, 536 U.S. at 440-41. By

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III. THE FAAAA DOES NOT PREEMPT MAINE FROM IMPLEMENTING ITS BAN ON FURNISHING TOBACCO TO MINORS BY REQUIRING RETAILERS OF TOBACCO TO USE A DELIVERY SERVICE THAT PROVIDES AGE VERIFICATION AND SIGNATURE SERVICES AND BY IMPUTING KNOWLEDGE OF TOBACCO DELIVERIES TO MOTOR CARRIERS FROM EVIDENCE ON THE OUTSIDE OF PACKAGES.

Looking "at the objectives of the . . . statute as a guide to the scope of the state law that Congress understood would survive," *Travelers*, 514 U.S. at 656, the Maine Act is not preempted by the FAAAA because Congress' objectives never were to eliminate state public health delivery laws, particularly those safeguarding children from tobacco.

A. Section 1555-C(3)(C) Is Not Preempted By The FAAAA.

1. As a public health law whose purpose is to safeguard children, section 1555-C(3)(C) has no "connection with" carrier services under the FAAAA. First, in reaching its decision, the court of appeals concluded that the public health purpose of a state statute has no relevance. Pet. App. 19-20. To the contrary, the ERISA cases teach us that such a purpose is the key consideration to the preemption analysis. Just as there is "nothing in the language of [ERISA] or the context of its passage indicat[ing] that Congress chose to displace general health care regulation,

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repeatedly using the phrase "such as," the conferees understood the list was not exclusive.

which historically has been a matter of local concern," *Travelers*, 514 U.S. at 661, there too is nothing in the language or context of the FAAAA's passage suggesting Congress enacted that law to displace longstanding state laws regulating how retailers can ship dangerous substances, which historically also have been a matter of local concern. *See Dillingham*, 519 U.S. at 332 n.7 ("lack of positive indication that Congress harbored" intent to preempt a type of state law argues against preemption of such law). There is no dispute that Maine had substance delivery laws on the books when the FAAAA was enacted, yet the conferees singled out Maine as a state that had no problematic *economic* regulations to be preempted. Preempting state public health laws implementing a ban on the sale and distribution of tobacco is especially unfounded because the federal government does not regulate in this area, thus creating an unintended regulatory void. *See, e.g., Granholm v. Heald*, 544 U.S. 460, 490 (2005) (certain state laws struck down as violative of the Commerce Clause, but states can regulate shipping of alcohol by requiring use of age-verification delivery services); *Morales*, 504 U.S. at 390-91 (state laws against false airfare advertising struck down as preempted in part because federal agency had authority to deal with problem).

Second, Congress passed a law – the Synar Amendment – which encourages and reinforces state exercise of public health police powers to enact and enforce laws regulating how tobacco is sold and distributed. *See Dillingham*, 519 U.S. at 332 n.7; *Travelers*, 514 U.S. at 665-66. By passing the Synar Amendment, Congress clearly recognized that states have broad powers over the sale and delivery of tobacco products, and did not think that federal

laws, like the ADA that preceded it, which is the model of preemption upon which the FAAAA is founded, would preempt those powers. No one disputes that Internet and telephone sales of tobacco are a serious and growing public health problem which undermines the purposes of the Synar Amendment. Section 1555-C(3)(C) is "genuinely responsive" to that public health problem, and therefore should be upheld. *See City of Columbus,* 536 U.S. at 442 (state laws "genuinely responsive" to safety concerns not preempted).

The Synar Amendment broadly promotes state public health powers, and "all powers and duties incidental and necessary to make such legislation effective are included by implication." 2B N. Singer, Statutes and Statutory Construction, § 55:04, at 388 (6th ed. 2000). This precept, that the greater includes the lesser, applies with full force here. The power of a state to ban retailers entirely from shipping contraband items (which is conceded here) includes the lesser power to ban retailers from making such shipments except by a specified manner. There is no reason to conclude that a state cannot choose a lesser restriction allowing delivery retailers to continue to sell tobacco in Maine with particular safeguards.

The suggestion that delivery sales are outside the ambit of the Synar Amendment's directive to control how tobacco is "distribute[d]," U.S. Pet. Br. 16-17 & n.4, is nonsensical. There is nothing in the Synar Amendment remotely suggesting that Congress' encouragement of state regulation of sale and distribution of tobacco was limited to over-the-counter sales, or that delivery sales via the telephone, or for that matter any other means that inventive retailers may come up with, were somehow excluded. The undeniable fact is that delivery is critically necessary

to "distribute" tobacco. Equally undeniable is that a sale requires the seller to "transfer and deliver" the purchased item to the buyer. U.C.C., § 2-301 ("The obligation of the seller is to transfer and deliver. . . ."). The Maine Act regulates the "transfer and deliver[y]" of tobacco products sales.

The objectives of both the FAAAA and the Synar Amendment can be achieved here without doing damage to either: state economic laws aimed at and having the effect of impeding competition between carriers are preempted, while state public health laws such as section 1555-C(3)(C) which are genuinely responsive to the tobacco problem are not. The argument that the two statutes can be harmonized by preempting state laws regulating tobacco delivery sales because the states have effective nonpreempted means to protect children other than those at issue is unsubstantiated and not consistent.[44] Obviously, controlling how retailers ship tobacco and how delivery services hand it over-the-doorstep are the most effective means to deal with the problem. Neither Respondents nor the United States have shown otherwise or that their alternative approaches come close to the efficacy of the

[44] For example, on the one hand, Respondents assert that Maine can generally ban the knowing delivery of contraband, Resp. Pet. Br. 17, and the United States argues that Maine can enact general bans and general age verification requirements, U.S. Pet. Br., 10-11, 17-18. On the other hand, they then go on to argue that Maine cannot use evidence on the outside of a delivered package to impute knowledge of its contents in an enforcement action against a carrier. Resp. Pet. Br., 17; U.S. Pet. Br., 12-13. Therefore, the general laws which are presented as being effective would in reality be unenforceable.

Maine Act to deal with the burgeoning problem of delivery sales.[45]

Third, section 1555-C(3)(C) does not interfere with Congress' objectives in enacting the FAAAA – competition between carriers free from state economic regulations. *See Dillingham,* 519 U.S. at 325; *Travelers,* 514 U.S. at 657-64. Section 1555-C(3)(C) is an obligation on retailers; it does not require a carrier to charge a particular price, follow a particular route, or provide a particular service. As with the ERISA cases, because the state law neither requires nor binds the carriers to do anything, there is no preemption. *Dillingham,* 519 U.S. at 332; *Travelers,* 514 U.S. at 662.

Maine's law can perhaps be read to impede competition, but only competition for unfettered delivery of contraband tobacco or tobacco to children, the sort of "service" the FAAAA certainly did not intend to protect. The FAAAA was enacted to *promote* competition, and all the Maine law does is require a retailer to use a carrier that chooses to compete for the *legal* tobacco delivery market. State laws that merely give incentives to take certain actions that are nonbinding are not generally preempted. *Travelers*, 514 U.S. at 668; *see also De Buono,* 520 U.S. at 814 n.9, 815-16; *Dillingham*, 519 U.S. at 334.

The conclusion of the court of appeals, on the other hand, is anticompetitive. A single carrier – UPS – can

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[45] The federal government, moreover, just two years after enacting the FAAAA, specifically "allow[ed] the States flexibility" regarding how to control youth access to tobacco. *Tobacco Regulation, supra*, 61 Fed. Reg. 1492, 1495. It thus is left up to each state to decide how to prevent children from getting tobacco products, without the need to prove which method works best.

foreclose competition for the legal tobacco delivery market in Maine by deciding it does not want to enter this market.[16] If the court of appeals is correct, then a single carrier can "preempt" for example state alcohol delivery laws relied upon by this Court in *Granholm*, because that carrier for its own business (and perhaps anticompetitive) reasons chooses not to provide the age verification services contemplated therein. This is little different than placing commodity and entry controls that the FAAAA was intended to prevent into the hands of one carrier.

The United States argues that this provision fails under the "connection with" prong because "the service . . . prescribed by [section 1555-C(3)(C)] is one that, as far as the record reflects, no carrier offers in the marketplace." U.S. Pet. Br. 12. The United States' reasoning is that if a single carrier already provided the exact service contemplated by this provision, that "independent commercial decision" would show that the statute had no "forbidden significant effect." *Id.* at 10-12. This argument is the exact opposite of the position of Respondents. Respondents chose to proceed on the theory that Maine's law was preempted so long as a *single* carrier did not provide the prescribed service, did not present evidence on the effect of Maine's law on carriers other than UPS, and objected to discovery on other carriers. Because Respondents have the heavy burden of demonstrating preemption, the lack of evidence in the record on the issue dooms Respondents' claim under this theory, not the Attorney General's defense. Most importantly, the FAAAA does not guarantee to any carrier

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[16] UPS's testimony in support of the FAAAA that "[w]e are willing to compete," thus rings hollow. *See House Hearing* (Rogers Testimony, UPS), *supra*.

or the carrier industry the right to deliver dangerous substances without state controls, whether or not any carrier provides a service that conforms with Maine's public health delivery laws on the date they are enacted.

Finally, regarding arguments over a "patchwork" of state tobacco laws, nonuniform regulation in nonpreempted areas was expected. *See City of Columbus,* 536 U.S. at 441. Public health delivery laws were a patchwork in 1994, and neither the carriers nor conferees so much as hinted that was a problem to be solved by the FAAAA. In the end, the Respondents' concerns regarding nonuniformity of *state public health delivery laws*, be it for tobacco, alcohol or wild animals, is an issue they can present to Congress in the same manner they did in 1994 when they dealt with *state economic laws.*

2. The court of appeals found section 1555-C(3)(C) was preempted because it "references" carrier services. Pet. App. 23. Under ERISA case law, however, the "reference to" prong is very narrow. It only applies "[w]here a State's law acts immediately and exclusively upon ERISA plans, . . . or where the existence of ERISA plans is essential to the law's operation." *Dillingham,* 519 U.S. at 325. Section 1555-C(3)(C) obligates retailers, not carriers, and therefore does not immediately act upon a carrier. Moreover, the provision requires retailers to use a "delivery service" imposing certain requirements, and "[d]elivery service" is defined to include more entities than those motor carriers covered by the FAAAA. Specifically, it includes "a person, including the United States Postal Service, who is engaged in the commercial delivery of letters, packages or other containers." 22 Me. Rev. Stat. § 1551(1-C). By contrast, under the FAAAA, "motor carrier" is defined as "a person providing commercial motor

vehicle . . . transportation for compensation," and "commercial motor vehicle" is a self-propelled or towed vehicle with gross weight or rating of 10,001 pounds or being used to transport more than eight passengers for compensation. Pub. L. No. 109-59, Title IV, §§ 4142(a), 4202(b), 119 Stat. 1747, 1751 (to be codified at 49 U.S.C. § 13102(14)); 49 U.S.C. §§ 31132(1)(A) & (B). Because Maine's law applies as well to vehicles and modes of transportation not meeting that definition – *e.g.*, delivery automobiles or small vans or a bicycle service – section 1555-C(3)(C) has no "reference to" carrier services. *See also* U.S. Pet. Br. 8-9 (using this analysis and reaching the same conclusion).

3. The court of appeals also found that this provision is preempted because it indirectly affects the timeliness and efficiency of UPS's services if UPS chooses to compete for this market. Pet. App. 23. Under ERISA analysis, the Court has explained that simply because a state law increases the costs of doing business does not alone mandate preemption. *De Buono,* 520 U.S. at 816. The Court has allowed that in certain extreme circumstances a state law having "acute, albeit indirect, economic effects, by intent or otherwise, as to force an ERISA plan to adopt a certain scheme of substantive coverage or effectively restrict its choice of insurers . . . might indeed be preempted." *Travelers,* 514 U.S. at 668.

The Court, however, need not engage in this inquiry here. The "acute" analysis is part of an effort to determine if a state law is the "type of law that Congress intended . . . to supercede." *De Buono,* 520 U.S. at 814, 816 n.16. The purpose of the inquiry is to determine whether Congress would have preempted a particular state law which has an indirect impact on congressional objectives if Congress had been aware of that impact. Here, no one can

reasonably believe that if the carrier industry had gone to Congress in 1994, just two years after the Synar Amendment, it could have persuaded Congress to preempt a state law requiring the retailer to use a delivery service providing the public health safeguards found in section 1555-C(3)(C).

In any event, Respondents have not carried the heavy burden of proof contemplated by this inquiry.[47] "Acute" means "sharp or severe effect," "extremely great or serious." Random House Unabridged Dictionary, 21 (2d ed. 1993). There has been no showing that section 1555-C(3)(C) would impose any "acute . . . economic effects" on UPS. It neither forces UPS to enter nor prevents it from competing for the legal tobacco delivery market.[48] The provision does not, of course, require UPS to do anything; it merely requires retailers – if they wish to deliver tobacco – to use an addressee-signature, adult-identification service. This might affect UPS because it gives the company an incentive to provide the service, if it was not already doing so. But this Court has made crystal clear that a state law does not have an "acute" effect within the meaning of a "relate to" preemption provision merely because it "provide[s] some measure of economic incentive to comport with the State's requirements." *Dillingham*, 514 U.S. at 332; *see also Travelers*, 514 U.S. at 659 ("An indirect economic influence . . . does not bind plan

[47] For that matter, to the extent the "significant forbidden effects" nomenclature used in *Morales* applies and suggests a more forgiving test, Respondents have not carried that burden either.

[48] Nor have Respondents shown, or attempted to show, that the legal tobacco delivery market is so critical to UPS's economic survival as to force UPS to provide this service.

administrators to any particular choice and thus function as a regulation of an ERISA plan itself. . . .").

Moreover, Respondents failed to show section 1555-C(3)(C) would impose significant, let alone acute, costs upon UPS that would prevent it from successfully competing. In particular, Respondents did not price the effect on UPS to provide an addressee-signature, age-verification service that retailers must use if they wish to ship tobacco. In particular, Respondents did not provide any costs for UPS of a *new* "adult-*addressee*-signature" delivery as compared to the *present* $2.75 "adult-*recipient*-signature" delivery, to the extent the two may be different. Respondents further presented no evidence quantifying the additional costs, if any, of utilizing UPS's preexisting procedures regarding failures of delivery when applied to the *new* service, nor what the cost would be to have pertinent information available on the DIAD at the time of delivery. Pet. App. at 28 n.14, 65 n.92; JA 105, 107; *see also* note 14, *supra*. Moreover, if the *new* service could be profitably priced at $3.00, for example, rather than $2.75 for the *present* service, that is not acute; it simply bears on the relative costs of competing carriers that may be passed on to their customers. *See Travelers*, 514 U.S. at 658-60 (upheld state surcharges which "are presumably passed on at least in part" to customers because they "simply bear[] on the costs of benefits and the relative costs of competing insurance to provide them.").

The court of appeals and the United States agree that in furtherance of Maine's public health responsibilities it can ban a retailer from shipping tobacco into Maine under the FAAAA. In such case, Maine would affect the market dramatically by stopping any delivery sales of tobacco in Maine – no retailer could use any carrier to deliver tobacco

to consumers in Maine, which is what New York has done for cigarettes. Section 1555-C(3)(C) is not so severe, and instead allows for a market for delivery sales of tobacco to develop. If such a market fails to develop, delivery services in Maine will be in the same situation as they would be under a total ban, which according to the court of appeals and the United States has no connection with carrier services and therefore is not preempted.

B. Section 1555-D Is Not Preempted By The FAAAA.

1. The court of appeals held that the first sentence of section 1555-D – which bans the *knowing* delivery of tobacco from an unlicensed retailer unless to a licensed distributor or retailer – survives preemption, Pet. App. 26, 29; and that no longer is in dispute. Resp. Pet. Br. 16-17. Normally, in order to enforce a ban or restriction on the *knowing* delivery of tobacco or any other substance, the state must put into evidence the package showing the markings or labels from which the fact-finder may discern whether the delivery service *knew* the package contained the problematic substance. *See, e.g.*, JA 32, 34, 36, 37. In response, the delivery service may present testimony that its employees did not see the markings or labels. Section 1555-D simply identifies that ordinary evidence so that the delivery person is deemed to know the package contains tobacco from the tobacco and markings.

The court of appeals found that use of this evidence was preempted because "imputing knowledge" forces a carrier to change its uniform practices by requiring its employees to actually look for these markings and do something if an employee saw them, *e.g.*, not deliver it if

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unlicensed or not deliver it to a child. Pet. App. 28. But without use of such evidence against a carrier, it has effectively obtained immunity from any ban or regulation of tobacco, alcohol, firearms or gambling material, for the obvious reason that aside from the markings and labels there is no other evidence to be had. No wonder the court of appeals recognized the "tension" and "practical" difficulties of its decision. *Id.* at 28-29. Proper application of the FAAAA preemption provision eliminates the "tension" and "practical" difficulties, for it permits the imputation of this knowledge to carriers.

2. Because the evidentiary use of tobacco markings and labels furthers public health objectives, and has nothing to do with the economic regulation of carriers, it has no "connection with" carrier services and therefore is not preempted. The accepted power to *impose* the ban on knowing deliveries under the first part of section 1555-D includes the lesser and implied power to *enforce* it. Such evidence has been used for as long as there have been contraband delivery laws, long preceding the FAAAA or the ADA. There is nothing in the language or history of the FAAAA's passage suggesting Congress intended to prevent the states from continuing to use such evidence. Such evidence certainly is part and parcel of the broad power to ban the delivery of unlicensed tobacco, and to ban youth access to tobacco as encouraged by the Synar Amendment. That a state cannot use evidence of markings and labels to prosecute carriers for unlicensed delivery of substances such as tobacco, alcohol and fireworks or for handing them over to children is "unsettling," *Travelers,* 514 U.S. at 665, and patently absurd. *See, e.g., Nixon v. Missouri Municipal League,* 541 U.S. 125 (2004) (Court will not construe a statute in a manner that leads to absurd or futile results).

Maine most certainly does want to use this evidence to affect the marketplace – by preventing illegal and unhealthy transactions involving tobacco. Requiring any person including a carrier to take heed of the markings and labels simply accomplishes those congressionally supported goals. Obviously, use of such evidence is not a "guise" for economic regulation, and does not interfere with the primary objective of FAAAA preemption – competition between carriers. Such evidence can be used against any and all delivery services and carriers equally. All delivery services and carriers are treated the same.

3. Because the evidentiary use of such markings and labels applies to all persons delivering tobacco, and not just carriers, there is no "reference to" the services protected by the FAAAA. *Dillingham,* 519 U.S. at 325.

4. For the same reasons discussed above regarding section 1555-C(3)(C), it is unnecessary to inquire further with respect to section 1555-D under the acute, indirect effects analysis. Because Congress would never have preempted the use of this type of evidence to enforce state laws against those who knowingly deliver contraband tobacco, or other dangerous substances, the acute inquiry is not called for.

In any event, Respondents have not shown an acute prohibited effect on carrier services. The court of appeals found that any effect warranted preemption, Pet. App. 28, which goes well beyond this Court's reasoning. UPS employees prior to the Maine Act looked for a variety of markings and other information on the outside of its packages, so that all sides of the package normally were

"visually scanned" for a variety of reasons.[49] UPS already specially processes packages containing certain property – alcohol and firearms – to comply with applicable state laws.[50] Looking additionally for a tobacco marking cannot reasonably be found to have an acute, or even significant, impact on UPS, and Respondents presented no evidence it did. Indeed, UPS has now incorporated into its systems the same sort of processing regime to comply with its New York settlement agreement – *e.g.*, actively looking for indicia of cigarettes – that Respondents claim is needed to comply with Maine's law.

Similarly, the only evidence in the record is that it costs UPS less than a penny per package to "visually scan" the label for additional indicia of tobacco, including the retailer's name. Respondents presented no evidence regarding how much it costs UPS to check the list of unlicensed retailers with its sophisticated computer system, a process similar to what UPS appears to be doing to comply with its settlement with New York. UPS continued to deliver tobacco only to licensed Maine retailers and distributors after the Maine Act, without apparent acute disruption. In addition, the cost to a multibillion dollar enterprise such as UPS of as much as $2 per package to process only 33 suspected tobacco packages over a five month period is *de minimis*. In sum, Respondents have not shown such an effect as to prevent or foreclose UPS from competing.

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[49] JA 98-100; *Meisel Deposition*, at 213:13-270:10 and Exhibit 13 (JA 32-38); note 7, *supra*.

[50] JA 107-08; note 8, *supra*.

Moreover, if Maine simply banned tobacco deliveries to consumers, similar to the approach of New York, the carriers would have to process tobacco packages in essentially the same manner as they would under the Maine Act. The only effect on carriers that could be characterized as acute, or significant, is the loss of business to deliver unlicensed tobacco or to deliver tobacco to children. No one can reasonably argue this is protected conduct under the FAAAA. In the end, Respondents did not come close to meeting their heavy burden of demonstrating that evidentiary use of markings and labels to impute knowledge to a carrier that it is delivering contraband tobacco has a forbidden effect on UPS's services in a manner prohibited by the FAAAA.

CONCLUSION

The decision of the court of appeals should be reversed.

Respectfully submitted,

G. STEVEN ROWE
Attorney General
PAUL STERN
Deputy Attorney General
(Counsel of Record)
MELISSA REYNOLDS O'DEA
CHRISTOPHER C. TAUB
PETER B. LAFOND
Assistant Attorneys General
Six State House Station
Augusta, ME 04333-0006
(207) 626-8568
(207) 287-3145 (fax)
Counsel for Petitioner

APPENDIX

STATUTORY PROVISIONS INVOLVED

1992 Synar Amendment
42 U.S.C. § 300x-26

§ 300x-26. State law regarding sale of tobacco products to individuals under age of 18

(a) Relevant law.

(1) In general. Subject to paragraph (2), for fiscal year 1994 and subsequent fiscal years, the Secretary may make a grant under section 1921 only if the State involved has in effect a law providing that it is unlawful for any manufacturer, retailer, or distributor of tobacco products to sell or distribute any such product to any individual under the age of 18.

* * *

(b) Enforcement.

(1) In general. For the first applicable fiscal year and for subsequent fiscal years, a funding agreement for a grant under section 1921 is that the State involved will enforce the law described in subsection (a) in a manner that can reasonably be expected to reduce the extent to which tobacco products are available to individuals under the age of 18.

Federal Aviation Administration Act of 1994

49 U.S.C. § 14501

§ 14501. Federal authority over intrastate transportation

* * *

(c) Motor carriers of property.

(1) General rule. Except as provided in paragraphs (2) and (3), a State, political subdivision of a State, or political authority of 2 or more States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of any motor carrier (other than a carrier affiliated with a direct air carrier covered by section 41713(b)(4) or any motor private carrier, broker, or freight forwarder with respect to the transportation of property.

(2) Matters not covered. Paragraph (1) –

(A) shall not restrict the safety regulatory authority of a State with respect to motor vehicles, the authority of a State to impose highway route controls or limitations based on the size or weight of the motor vehicle or the hazardous nature of the cargo, or the authority of a State to regulate motor carriers with regard to minimum amounts of financial responsibility relating to insurance requirements and self-insurance authorization;

(B) does not apply to the intrastate transportation of household goods; and

(C) does not apply to the authority of a State or a political subdivision of a State to enact or enforce a law, regulation, or other provision relating to the price of for-hire motor vehicle transportation by a tow truck, if such

transportation is performed without the prior consent or authorization of the owner or operator of the motor vehicle.

(3) State standard transportation practices.

(A) Continuation. Paragraph (1) shall not affect any authority of a State, political subdivision of a State, or political authority of 2 or more States to enact or enforce a law, regulation, or other provision, with respect to the intrastate transportation of property by motor carriers, related to –

(i) uniform cargo liability rules,

(ii) uniform bills of lading or receipts for property being transported,

(iii) uniform cargo credit rules,

(iv) antitrust immunity for joint line rates or routes, classifications, mileage guides, and pooling, or

(v) antitrust immunity for agent-van line operations (as set forth in section 13907), if such law, regulation, or provision meets the requirements of subparagraph (B).

(B) Requirements. A law, regulation, or provision of a State, political subdivision, or political authority meets the requirements of this subparagraph if –

(i) the law, regulation, or provision covers the same subject matter as, and compliance with such law, regulation, or provision is no more burdensome than compliance with, a provision of this part or a regulation issued by the Secretary or the Board under this part; and

(ii) the law, regulation, or provision only applies to a carrier upon request of such carrier.

(C) Election. Notwithstanding any other provision of law, a carrier affiliated with a direct air carrier through common controlling ownership may elect to be subject to a law, regulation, or provision of a State, political subdivision, or political authority under this paragraph.

(4) Nonapplicability to Hawaii. This subsection shall not apply with respect to the State of Hawaii.

(5) Limitation on statutory construction. Nothing in this section shall be construed to prevent a State from requiring that, in the case of a motor vehicle to be towed from private property without the consent of the owner or operator of the vehicle, the person towing the vehicle have prior written authorization from the property owner or lessee (or an employee or agent thereof) or that such owner or lessee (or an employee or agent thereof) be present at the time the vehicle is towed from the property, or both.

49 U.S.C. § 41713

§ 41713. Preemption of authority over prices, routes, and service

* * *

(b) Preemption.

* * *

(4) Transportation by air carrier or carrier affiliated with a direct air carrier.

(A) General rule. Except as provided in subparagraph (B), a State, political subdivision of a State, or political authority of 2 or more States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier or carrier affiliated with a direct air carrier through common controlling ownership when such carrier is transporting property by aircraft or by motor vehicle (whether or not such property has had or will have a prior or subsequent air movement).

(B) Matters not covered. Subparagraph (A) –

(i) shall not restrict the safety regulatory authority of a State with respect to motor vehicles, the authority of a State to impose highway route controls or limitations based on the size or weight of the motor vehicle or the hazardous nature of the cargo, or the authority of a State to regulate motor carriers with regard to minimum amounts of financial responsibility relating to insurance requirements and self-insurance authorization; and

(ii) does not apply to the transportation of household goods, as defined in section 13102 of this title.

MAINE STATUTES INVOLVED

22 Me. Rev. Stat. § 1555-A

§ 1555-A. Identification cards

A licensee may refuse to sell tobacco to any person who fails to display upon request an identification card issued under Title 29-A, section 1410 or a motor vehicle operator's license bearing the photograph of the operator and issued under Title 29-A.

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22 Me. Rev. Stat. § 1555-B

§ 1555-B. Sales of tobacco products

1. Retail sales. Tobacco products may be sold at retail only in a direct, face-to-face exchange in which the purchaser may be clearly identified and through the mail under procedures approved by the department to provide reliable verification that the purchaser is not a minor. For direct, face-to-face sales, employees who sell tobacco products must be at least 17 years of age. An employee who is at least 17 years of age but less than 21 years of age may sell tobacco products only in the presence of an employee who is at least 21 years of age and is in a supervisory capacity.

2. Sales to minors prohibited. A person may not sell, furnish, give away or offer to sell, furnish or give away a tobacco product to any person under 18 years of age. Tobacco products may not be sold at retail to any person under 27 years of age unless the seller first verifies that person's age by means of reliable photographic identification containing the person's date of birth.

3. Sales through vending machines. Tobacco products may be sold through vending machines according to section 1553-A.

4. Wholesale sales. Tobacco products may be distributed at wholesale without a face-to-face exchange only in the normal course of trade and under procedures approved by the Bureau of Revenue Services to ensure that tobacco products are not provided to any person under 18 years of age.

5. REPEALED. Laws 2003, c. 452, § K-7, eff. July 1, 2004.

5-A. Possession and use of cigarettes, cigarette papers or tobacco products by minors prohibited. Except as provided in subsection 5-B, a person under 18 years of age may not:

A. Purchase, possess or use cigarettes, cigarette papers or any tobacco product;

B. Violate paragraph A after having previously violated this subsection; or

C. Violate paragraph A after having previously violated this subsection 2 or more times.

5-B. Exception to possession by minor. A person under 18 years of age may transport or permit to be transported in a motor vehicle cigarettes, cigarette papers or tobacco products in the original sealed package in which they were placed by the manufacturer if the transportation is in the scope of that person's employment.

5-C. Use of false identification by minors prohibited. A person under 18 years of age may not:

A. Offer false identification in an attempt to purchase a tobacco product or to purchase, possess or use cigarettes, cigarette papers or any other tobacco product;

B. Violate paragraph A after having previously violated this subsection; or

C. Violate paragraph A after having previously violated this subsection 2 or more times.

6. Display of prohibition of sales to juveniles. A dealer or distributor of tobacco products shall post notice of this section prohibiting tobacco and cigarette paper sales to persons under 18 years of age. Notices must be publicly and conspicuously displayed in the dealer's or distributor's place of business in letters at least 3/8 inches in height. Signs required by this section may be provided at cost by the department.

7. Enforcement. Law enforcement officers shall enforce this section. A citizen may register a complaint under this section with the law enforcement agency having jurisdiction. The law enforcement agency may notify any establishment or individual subject to this section of a citizen complaint regarding that establishment's or individual's alleged violation of this section and shall keep a record of that notification.

8. Fines. Violations of this section are subject to fines according to this subsection.

A. A person who violates subsection 1, 2, 3 or 4 commits a civil violation for which a fine of not less than $50 and not more than $1,500, plus court costs, must be adjudged for any one offense. Except pursuant to Title 15, section 3314, the fine may not be suspended.

A-1. An employer of a person who violates subsection 1, 2, 3 or 4 commits a civil violation for which a fine of not less than $50 and not more than $1,500, plus court costs, must be adjudged. The fine may not be suspended.

B. A person who violates subsection 5-A or 5-C commits a civil violation for which the following fines may be adjudged.

1) For a first offense, a fine of not less than $100 and not more than $300 may be imposed. The judge, as an alternative to or in addition to the fine permitted by this subparagraph, may assign the violator to perform specified work for the benefit of the State, the municipality or other public entity or a charitable institution.

2) For a 2nd offense, a fine of not less than $200 and not more than $500 may be imposed. The judge, as an alternative to or in addition to the fine permitted by this subparagraph, may assign the violator to perform specified work for the benefit of the State, the municipality or other public entity or a charitable institution.

3) For all subsequent offenses, a fine of $500 must be imposed and that fine may not be suspended. The judge, in addition to the fine permitted by this subparagraph, may assign the violator to perform specified work for the benefit of the State, the municipality or other public entity or a charitable institution.

C. A person who violates subsection 6 commits a civil violation for which a fine of not less than

$50 and not more than $200 may be adjudged for any one offense.

9. Distribution of fines. Fines and forfeitures collected pursuant to subchapter 1 and this subchapter must be credited as follows: one half to the General Fund and ½ to be deposited in a nonlapsing account of the Maine Criminal Justice Academy for the purpose of providing funds for training and recertification of part-time and full-time law enforcement officers.

10. Affirmative defense. It is an affirmative defense to prosecution for a violation of subsection 1, 2 or 4 that the defendant sold, furnished, gave away or offered to sell, furnish or give away a tobacco product to a person under 18 years of age in reasonable reliance upon a fraudulent proof of age presented by the purchaser.

11. Manner of displaying and offering for sale. Tobacco products may be displayed or offered for sale only in a manner that does not allow the purchaser direct access to the tobacco products. The requirements of this subsection do not apply to the display or offering for sale of tobacco products in multi-unit packages of 10 or more units, in tobacco specialty stores or in locations in which the presence of minors is generally prohibited. This requirement does not preempt a municipal ordinance that provides for more restrictive regulation of the sale of tobacco products.

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22 Me. Rev. Stat. § 1555-C

§1555-C. Delivery sales of tobacco products

The following requirements apply to delivery sales of tobacco products within the State.

1. License required. It is unlawful for any person to accept an order for a delivery sale of tobacco products to a consumer in the State unless that person is licensed under this chapter as a tobacco retailer. The following penalties apply to violations of this subsection.

A. A person who violates this subsection commits a civil violation for which a fine of not less than $50 and not more than $1,500 may be adjudged for each violation.

B. A person who violates this subsection after having been previously adjudicated as violating this subsection or subsection 2, 3 or 4 commits a civil violation for which a fine of not less than $1,000 and not more than $5,000 may be adjudged.

2. Requirements for accepting order for delivery sale. The following provisions apply to acceptance of an order for a delivery sale of tobacco products.

A. When accepting the first order for a delivery sale from a consumer, the tobacco retailer shall obtain the following information from the person placing the order:

(1) A copy of a valid government-issued document that provides the person's name, current address, photograph and date of birth; and

(2) An original written statement signed by the person documenting that the person:

(a) Is of legal age to purchase tobacco products in the State;

(b) Has made a choice whether to receive mailings from a tobacco retailer;

(c) Understands that providing false information may constitute a violation of law; and

(d) Understands that it is a violation of law to purchase tobacco products for subsequent resale or for delivery to persons who are under the legal age to purchase tobacco products.

B. If an order is made as a result of advertisement over the Internet, the tobacco retailer shall request the e-mail address of the purchaser and shall receive payment by credit card or check prior to shipping.

C. Prior to shipping the tobacco products, the tobacco retailer shall verify the information provided under paragraph A against a commercially available database derived solely from government records consisting of age and identity information, including date of birth.

D. A person who violates this subsection commits a civil violation for which a fine of not less than $50 and not more than $1,500 may be adjudged for each violation.

E. A person who violates this subsection after having been previously adjudicated as violating this subsection or subsection 1, 3 or 4 commits a civil violation for which a fine of not less than

$1,000 and not more than $5,000 may be adjudged.

3. Requirements for shipping a delivery sale. The following provisions apply to a tobacco retailer shipping tobacco products pursuant to a delivery sale.

A. Prior to shipping, the tobacco retailer shall provide to the delivery service the age of the purchaser as provided under subsection 2, paragraph A and verified under subsection 2, paragraph C.

B. The tobacco retailer shall clearly mark the outside of the package of tobacco products to be shipped to indicate that the contents are tobacco products and to show the name and State of Maine tobacco license number of the tobacco retailer.

C. The tobacco retailer shall utilize a delivery service that imposes the following requirements:

(1) The purchaser must be the addressee;

(2) The addressee must be of legal age to purchase tobacco products and must sign for the package; and

(3) If the addressee is under 27 years of age, the addressee must show valid government-issued identification that contains a photograph of the addressee and indicates that the addressee is of legal age to purchase tobacco products.

D. The delivery instructions must clearly indicate the requirements of this subsection and must declare that state law requires compliance with the requirements.

E. A person who violates this subsection commits a civil violation for which a fine of not less than $50 and not more than $1,500 may be adjudged for each violation.

F. A person who violates this subsection after having been previously adjudicated as violating this subsection or subsection 1, 2 or 4 commits a civil violation for which a fine of not less than $1,000 and not more than $5,000 may be adjudged.

4. Reporting requirements. No later than the 10th day of each calendar month, a tobacco retailer that has made a delivery sale of tobacco products or shipped or delivered tobacco products into the State in a delivery sale in the previous calendar month shall file with the Department of Administrative and Financial Services, Bureau of Revenue Services a memorandum or a copy of each invoice that provides for each delivery sale the name and address of the purchaser and the brand or brands and quantity of tobacco products sold. A tobacco retailer that meets the requirements of 15 United States Code, Section 375 et seq. (1955) satisfies the requirements of this subsection. The following penalties apply to violations of this subsection.

A. A person who violates this subsection commits a civil violation for which a fine of not less than $50 and not more than $1,500 may be adjudged for each violation.

B. A person who violates this subsection after having been previously adjudicated as violating this subsection or subsection 1, 2 or 3 commits a civil violation for which a fine of not less than $1,000 and not more than $5,000 may be adjudged.

5. Unlawful ordering. It is unlawful to submit ordering information for tobacco products by delivery sale under subsection 2, paragraph A in the name of another person. A person who violates this subsection commits a civil violation for which a fine of not more than $10,000 may be adjudged.

6. Rulemaking. The department and the Department of Administrative and Financial Services shall adopt rules to implement this section. Rules adopted pursuant to this subsection are routine technical rules as defined in Title 5, chapter 375, subchapter 2-A.

7. Forfeiture. Any tobacco product sold or attempted to be sold in a delivery sale that does not meet the requirements of this section is deemed to be contraband and is subject to forfeiture in the same manner as and in accordance with the provisions of Title 36, section 4372-A.

8. Enforcement. The Attorney General may bring an action to enforce this section in District Court or Superior Court and may seek injunctive relief, including a preliminary or final injunction, and fines, penalties and equitable relief and may seek to prevent or restrain actions in violation of this section by any person or any person controlling such person. In addition, a violation of this section is a violation of the Maine Unfair Trade Practices Act.

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22 Me. Rev. Stat. § 1555-D

§1555-D. Illegal delivery of tobacco products

A person may not knowingly transport or cause to be delivered to a person in this State a tobacco product purchased from a person who is not licensed as a tobacco retailer in this State, except that this provision does not apply to the transportation or delivery of tobacco products to a licensed tobacco distributor or tobacco retailer. A person is deemed to know that a package contains a tobacco product if the package is marked in accordance with the requirements of section 1555-C, subsection 3, paragraph B or if the person receives the package from a person listed as an unlicensed tobacco retailer by the Attorney General under this section.

1. Lists. The Attorney General shall maintain lists of licensed tobacco retailers and known unlicensed tobacco retailers. The Attorney General shall provide to a delivery service lists of licensed tobacco retailers and known unlicensed tobacco retailers. The list of known unlicensed tobacco retailers is confidential. A delivery service that receives a list of known unlicensed tobacco retailers shall maintain the confidentiality of the list.

2. Penalty. The following penalties apply for violation of this section.

A. A person who violates this section commits a civil violation for which a fine of not less than $50 nor more than $1500 may be adjudged for each violation. A fine imposed under this paragraph may not be suspended.

B. An employer of a person who, while working and within the scope of that person's employment, violates this section commits a civil violation for

which a fine of not less than $50 nor more than $1,500 may be adjudged for each violation. A fine imposed under this paragraph may not be suspended.

3. Enforcement. The Attorney General may bring an action to enforce this section in District Court or Superior Court and may seek injunctive relief, including a preliminary or final injunction, and fines, penalties and equitable relief and may seek to prevent or restrain actions in violation of this section by any person or any person controlling such person. In addition, a violation of this section is a violation of the Maine Unfair Trade Practices Act.

4. Affirmative defense. It is an affirmative defense to a prosecution under this section that a person who transported tobacco products or caused tobacco products to be delivered reasonably relied on licensing information provided by the Attorney General under this section.

5. Rulemaking. The department shall adopt rules to implement this section. Rules adopted pursuant to this subsection are routine technical rules as defined in Title 5, chapter 375, subchapter 2-A.

6. Forfeiture. Any tobacco product sold or attempted to be sold in a delivery sale that does not meet the requirements of this section is deemed to be contraband and is subject to forfeiture in the same manner as and in accordance with the provisions of Title 36, section 4372-A.

11/13/07

(18)

No. 06-457

In The
Supreme Court of the United States

G. STEVEN ROWE, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF THE STATE OF MAINE,

Petitioner,

v.

NEW HAMPSHIRE MOTOR TRANSPORT ASSOCIATION, MASSACHUSETTS MOTOR TRANSPORTATION ASSOCIATION, INC., and VERMONT TRUCK & BUS ASSOCIATION, INC.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

REPLY BRIEF FOR PETITIONER

G. STEVEN ROWE
Attorney General
PAUL STERN
Deputy Attorney General
(*Counsel of Record*)
MELISSA REYNOLDS O'DEA
CHRISTOPHER C. TAUB
PETER B. LAFOND
Assistant Attorneys General
Office of the Attorney General
6 State House Station
Augusta, ME 04333-0006
Tel: (207) 626-8568

Counsel for Petitioner

CUSHLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

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PETITIONER'S REPLY BRIEF

Maine, like many States, permits tobacco products to be sold over the telephone or Internet and then delivered to the purchasers. Such sales create obvious risks that the tobacco products will end up in the hands of minors, in violation of state law and federal policy. Maine therefore adopted several common sense provisions designed to protect against that danger. The FAAAA does not preempt those laws.

No party suggests that the FAAAA preemption provisions can be read literally. A literal reading of the provisions would require the preemption of all 50 States' laws banning the sale of tobacco to minors, for such laws prevent carriers from delivering tobacco in some instances and thereby eliminate a "service" they might otherwise provide. The United States candidly concedes that such laws are not preempted (U.S. Br. 29); Respondents tacitly concede this by not contesting the First Circuit's holding that the first sentence of 22 Me. Rev. Stat. §1555-D (barring the knowing transport of tobacco from unlicensed retailers to unlicensed recipients) is not preempted. Resp. Br. 24, 44. The challenge, then, is to give meaning to the preemption provisions while not reading them so expansively that they preempt state laws that Congress did not intend to supersede.

This Court faced a similar challenge in its ERISA cases, finding that statute's "relate to" preemption language to be "unhelpful" and "frustrating." *New York State Conference of Blue Cross & Blue Shield*

Plans v. Travelers Ins. Co., 514 U.S. 645, 655 (1995). The Court concluded that it must "look instead at the objectives of the ERISA statute as a guide to the scope of the state law that Congress understood would survive." *Id.* at 656. That reasoning fully applies to the FAAAA.

No one can seriously dispute that Congress' objective in enacting the FAAAA was to free motor carriers from state economic regulations that interfered with competition for markets. Neither Respondents nor the United States provided an iota of evidence suggesting that Congress was concerned with state health laws, generally, or state contraband laws, specifically. "Congress understood" that those types of laws "would survive." Accordingly, the FAAAA does not preempt the two Maine provisions at issue. The same result obtains when those two provisions are assessed under the ERISA "reference to" or "connection with" test. The provisions do not specifically reference carriers subject to the FAAAA; and they either place no impositions on carriers (in the case of §1555-C(3)(C)) or only minor impositions (in the case of §1555-D).

Respondents take a different approach, which is at once wildly expansive and internally inconsistent. While asserting that state laws affecting UPS by "even a second" (Resp. Br. 8) are among the evils Congress sought to address, they simultaneously seek to comfort the Court by asserting that many of the state contraband laws called into question by the First Circuit's ruling are not preempted "because they make criminal only the 'knowing' transportation of

certain items" while refusing to acknowledge that a state can use the only identified evidence to establish knowledge. Resp. Br. 46. This Court should reject Respondents' invitation to read the FAAAA preemption provisions in a manner that is unworkable and far beyond anything Congress could possibly have envisioned.

I. The FAAAA Does Not Preempt The Maine Laws Because Congress Did Not Intend To Preempt State Health And Contraband Laws When It Enacted The FAAAA.

A. The "Objectives of the" FAAAA Are "a Guide to the Scope of the State Law that Congress Understood Would Survive."

Respondents contend that the FAAAA preemption provisions are sufficiently different from the ERISA preemption provision that the Court should not apply the rule that it "look . . . at the objectives of the . . . statute as a guide to the scope of the state law that Congress understood would survive." Resp. Br. 27-28; *see also* U.S. Br. 9-10. Instead, assert Respondents, *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374 (1992), provides the last word on construing the FAAAA. That contention lacks merit.

First, the *reason* the Court relied on ERISA cases in *Morales* retains its vitality. Both preemption provisions use the phrase "relate[] to." In *Travelers*, the Court recognized the difficulties with that phrase,

observing that it cannot be taken "to extend to the furthest stretch of its indeterminacy," or else "for all practical purposes pre-emption would never run its course." 514 U.S. at 656. The same problem necessarily applies when that term is used in the FAAAA (and the ADA). It makes no sense to assert that "relates to" "extend[s] to the furthest stretch of its indeterminacy" when used in ERISA, but not when it is used in the FAAAA. The problem exists in both statutes; and the Court's solution to the problem fully applies to both. There is no basis upon which to believe that Congress, when it enacted the FAAAA, would *not* have wanted its objectives to serve as "a guide to the scope of the state law that Congress understood would survive." *Travelers*, 514 U.S. at 656.

Second, early ERISA and ADA cases presented clear situations where the state laws were pre-empted; it was not until *Travelers* that the Court addressed closer cases, requiring further refinement of the preemption analysis because the limitless "relates to" language was "unhelpful." *De Buono v. NYSA-ILA Medical and Clinical Servs. Fund*, 520 U.S. 806, 813 (1997). The Court in *Travelers* did not so much change its analysis, as Respondents suggest, but rather applied time-honored, common sense considerations to avoid over-broad results unintended by Congress. In *City of Columbus v. Ours Garage & Wrecker Service*, 536 U.S. 424, 438, 440-41 (2002), the Court essentially adopted this approach for the FAAAA, explaining that FAAAA preemption analysis begins with the presumption against preemption and requires

resort to the objectives of Congress revealed by, *inter alia*, the legislative history.

Third, the difference between ERISA and the FAAAA upon which Respondents and the United States rely does not justify reading the FAAAA's provisions more expansively. To be sure, ERISA creates a uniform body of federal law, whereas the FAAAA was "adopted as part of the *deregulation* of transportation industries." U.S. Br. 10. That difference does not, however, militate in favor of giving a broader reading to the FAAAA preemption provisions. In the first place, it only begs the question of the breadth of state laws that are either replaced by federal law or by nothing at all. Moreover, the danger of reading a preemption provision more broadly than Congress intended is far higher when there is no federal law serving as a backstop. For this reason, in *Morales*, 504 U.S. at 390-91, and *American Airlines, Inc. v. Wolens*, 513 U.S. 219, 224 (1995), the Court was careful to point out that there was a federal agency that could deal with false advertising and frequent flier issues even though the States could not. Here, of course, no federal agency regulates youth access to tobacco.

Finally, Petitioner's reading of the FAAAA is consistent with the recognition in *Morales* that the Court was not "set[ting] out on a road that leads to pre-emption of state laws against gambling and prostitution as applied to airlines." 504 U.S. at 390. The Court clearly understood that laws removed from

Congress' core objectives are to be dealt with differently than laws that go to the heart of Congress' concerns.

B. When It Enacted the FAAAA, Congress Did Not Have the Objective of Preempting State Health and Contraband Laws.

In *Travelers*, this Court stated that "nothing in the language of [ERISA] or the context of its passage indicates that Congress chose to displace general health care regulations, which historically has been a matter of local concern." 514 U.S. at 661 (citation omitted). The same is true for the FAAAA.

1. After carefully scouring the background and legislative history of the FAAAA, the ADA, and other federal laws and regulations, neither Respondents, the United States, nor their supporting *amici* uncovered even a hint that Congress intended to preempt state public health or contraband laws. To the contrary, the committee report used the term "economic regulations" nine times, and never suggested preemption of *all* regulations having an effect on carriers' operations. H.R. Conf. Rep. No. 103-677, 82-88 (1994), *reprinted in* 1994 U.S.C.C.A.N. 1754-60. The testimony, particularly from the Department of Transportation (DOT), explained the problem to be "economic regulations" such as "entry controls, tariff filings, and rate regulation, restrictions on operations and grants of antitrust immunity" generally under the auspices of state public utilities commissions. *Legislation to Preempt State Motor Carrier Regulations Pertaining to Rates, Routes, and Services: Hearing Before the House Subcomm. on Surface Transp. of the House Comm. on Public Works and Transp.* ("*FAAAA Hearing*"), 103d Cong., 2d Sess. 21, 22, 23, 27 (1994).

DOT determined which States had problematic laws warranting preemption "based on [its] interpretation of what constitutes economic regulation." *Id.* at 23. Based on its understanding of the "economic regulations" to be preempted (*e.g.*, tariffs and entry restrictions), DOT, and the committee itself, determined that Maine (which had public health contraband laws on the books at the time) was already deregulated. Pet. Br. 33-34 (citing testimony). Indeed, one searches the 85-page report submitted by DOT (*FAAAA Hearing*, VI) in vain for a single indication that a health or contraband law was a concern prompting the legislation. U.S. Dept. of Transportation, *Report to Congress: "Impact of State Regulation on the Package Express Industry"* (September 1990).

This reading of the history of the passage of the FAAAA is confirmed by the committee's reliance upon *Federal Express Corp. v. California Public Utilities Commission*, 936 F.2d 1075 (9th Cir. 1991), *cert. denied*, 504 U.S. 979 (1992). The Ninth Circuit recognized that the ADA's preemption provision "should be understood as allowing the state to act in an area of non-economic legislation." 936 F.2d at 1078. Respondents concede that, along with *Morales*, this was the only decision relied upon by the committee, yet they

misread its import. Br. 26. Contrary to their assertion, the decision was not cited by the committee only for the "anomalous result" of air and motor carriers being treated differently. Rather, the committee understood from DOT's testimony that the FAAAA "would codify in law the Ninth Circuit FedEx decision, *but also* would make the regulatory exemption available to a much broader class of carriers." *FAAAA Hearing*, 22 (emphasis added); *see also* Pet. Br. 30.[1]

2. Prior to this case, the United States repeatedly explained to this Court that Congress did not intend to preempt regulation of motor carriers in general, but just *economic* regulation:

> In describing the type of regulation that had been found to burden interstate commerce, the Conference Report referred specifically to "*[s]tate economic regulation* of motor carrier operations." The italicized language is significant in two respects. First, that language is clearly intended to describe the category of regulation that is subject to the general rule of preemption established by [the FAAAA]. . . . Second, the Conference Report referred to the deleterious effects not of state motor carrier regulation generally, but of "state *economic* regulation."

City of Columbus v. Ours Garage & Wrecker Service, Brief of the United States as *Amicus Curiae*, 23-24 (italics in original) (citations omitted). Similarly, in supporting the preservation of "state laws prohibiting 'gambling, prostitution, or the sale of illegal drugs . . . by an airline,' . . . or the like," the United States explained that "[u]nlike state laws regarding air fare advertising, those state laws do not relate to rates, routes, or services in a manner implicating competition or the pro-competitive policies of the [ADA]." *Morales*, Brief of the United States as *Amicus Curiae*, 30-31 (citations omitted). Neither do Maine's tobacco delivery laws. Just as Congress did not intend that gambling, obscenity and prostitution laws "relate to" "services" under the ADA, Congress did not intend that state health and contraband laws "relate to" "services" under the FAAAA.

3. Respondents argue that Congress' primary objective was to eliminate state laws of all kinds that might create a "patchwork" and affect the "uniformity" of carrier procedures. Resp. Br. 35-36. This argument is contradicted by Respondents' acceptance of the validity of state laws, such as the first sentence of §1555-D, that prohibit the knowing delivery of contraband. Different States can promulgate different permutations of bans on the transport of unhealthy items, such as cigarettes, cigars, smokeless tobacco, gambling material, obscene material, alcohol, firearms, or wildlife. In other words, a patchwork is

[1] The United States has it backwards when it suggests that this decision indicates an expansion of preemption beyond economic regulation insofar as the Ninth Circuit noted that certain types of preempted state regulations were not "patently economic." U.S. Br. 25. That only supports Petitioner's view that a court must determine if the objectives of the state statute are economic or noneconomic, be they patent or not.

inevitable for the laws that Respondents concede are not preempted. And, for that matter, under *Morales*, there is no suggestion that States must be uniform with respect to gambling, prostitution and obscenity laws, even as they affect the services offered by airlines.

In support of their "patchwork" argument, Respondents distort a phrase in the committee report to suggest that the concern was over the "'sheer diversity of [state] regulatory schemes.'" Resp. Br. 4 (bracketed word added by Respondents). The actual text, however, is "sheer diversity of *these* regulatory schemes," and "*these* regulatory schemes" refers only to "State *economic* regulation," twice identified as the problem in the preceding sentences in the same paragraph. Conf. Rep., 87, *reprinted in* 1994 U.S.C.C.A.N. 1759 (emphasis added). State laws licensing only particular carriers to ship "types of commodities" were a perceived problem, Resp. Br. 41, but unhealthy *contraband* is not considered to be a *commodity* and Respondents identify nothing indicating otherwise. None of the examples in the committee report or testimony hinted that state regulation of contraband, in particular tobacco, was "economic regulation." *See* Pet. Br. 31-35 & nn.40-42. As a matter of both common sense and tradition, the sphere of public health laws is distinct from the sphere of economic regulation of carriers.

For similar reasons, Respondents' assertion that federal laws can "have effects beyond those enumerated in the legislative history" and so preempt public

health as well as economic regulations misses the mark. Resp. Br. 41 (citing *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75 (1998)). *Oncale* spoke of "statutory prohibitions [that] go beyond the principal evil to cover reasonably comparable evils." 523 U.S. at 79. But public health laws are not a "reasonably comparable evil" to the problem of *economic* regulation. While federal legislation does not need to be surgically precise, it should not be read to preempt an entire set of a state's traditional police powers unless the congressional intent is manifest.

4. Respondents miss the point when they assert that Petitioner's position is inconsistent with the list of exceptions set forth in 49 U.S.C. §§14501(c) and 41713(b)(4)(A). The issue is not whether there is a specific health "exception" or a specific contraband "exception." Rather, the issue is discerning Congress' objectives in enacting the FAAAA, which will serve "as a guide to the scope of the state law that Congress understood would survive." *Travelers*, 514 U.S. at 656. As we have noted (Pet. Br. 34-35), ERISA's preemption provision also contains specific exceptions, but this Court has rejected preemption challenges to several state laws that did *not* fall within those exceptions. The limitless nature of "relates to" provisions requires courts to do more than determine whether a specific exception applies. And the legislative history of the exceptions supports that conclusion. Pet. App. 35 (showing that Congress did not intend the list to be "all inclusive"). Respondents' theory that exemption from FAAAA preemption is

limited to state laws that are part of "an existing comprehensive federal regulatory scheme" (Br. 38-39), conflicts with the committee's explanation that state authority in the enumerated but "not . . . all inclusive," "partially-identified" areas "is unchanged, since State regulation in those areas is not a price, route or service." Conf. Rep., 84, *reprinted in* 1994 U.S.C.C.A.N. 1756. There was no suggestion that federal involvement was a prerequisite for exemption.

5. Finally, Respondents suggest that it is unworkable to determine whether the purpose of a state law is to further public health or rather is economic in nature. Resp. Br. 20, 42; *see also* U.S. Br. 27-28. This is neither an unexpected nor difficult task. Indeed, in *Ours Garage*, 536 U.S. at 442, the Court held that only a state tow truck law that is "genuinely responsive to safety concerns" falls within the exception set forth in §14501(c)(2)(A). *See also* Pet. App. 26 n.38 (citing cases); *Omya v. State of Vermont*, 33 Fed. Appx. 581 (2d Cir. 2002) (permit limiting trucking which seeks to achieve noneconomic goal of environmental protection not preempted by FAAAA). And in *Gade v. National Solid Wastes Management Ass'n*, 505 U.S. 88, 105 (1992), the Court explained that courts look to the purpose and effect of state statutes in assessing preemption challenges. Courts consider the purposes of state laws in a wide variety of constitutional contexts, in particular when applying the presumption against preemption. Indeed, the Court in *Morales* had no problem recognizing States' public health authority regarding prostitution and gambling,

even though Congress was silent on the issue, 504 U.S. at 390; *see also* U.S. Br. 17 (proposing test requiring state law to have a public purpose).

C. Sections 1555-C(3)(C) and 1555-D Are State Health and Contraband Laws that Fall Beyond the Scope of State Laws that Congress Intended to Preempt.

1. Sections 1555-C(3)(C) and 1555-D fall far outside the scope of laws Congress was targeting when it enacted the FAAAA. These statutes are straightforward health and contraband laws that were designed to prevent tobacco products from falling into the hands of minors. Every indicator of the "objectives of the [FAAAA] statute" is that such laws are the sort of "law[s] that Congress understood would survive."

Respondents' suggestion (Br. 5, 28) that §§1555-C(3)(C) and 1555-D were merely designed to increase tax revenues is belied by the district court's findings that the challenged provisions dealt *not* with tax collection, but with public health. Pet. App. 61 n.83. To the extent the provisions increase tax collections, they have the public health effect of keeping tobacco out of the hands of children for the obvious reason

that the more expensive tobacco is, the less likely children can afford to buy it.[3]

2. The Synar Amendment confirms the wide gap between the Maine laws and Congress' objectives in enacting the FAAAA. Sections 1555-C(3)(C) and 1555-D further Maine's efforts to comply with the Synar Amendment. It is difficult to imagine that the FAAAA meant to forbid these state efforts. That Amendment was passed in 1992 after the ADA, which is the model for the FAAAA, and there is nothing in the passage of the FAAAA in 1994 or the promulgation of the Amendment's regulations in 1996 that hint that state tobacco contraband laws were to be excluded as a means of addressing youth smoking. Such circumstances counsel against preemption. *California Div. of Labor Standards Enforcement v. Dillingham Constr., N.A.*, 519 U.S. 316, 329 n.6 (1997) ("unlikely that the Congress that enacted ERISA would later have sought to encourage a state program that ERISA would pre-empt."); *id.* at 332 n.7 ("Congress' silence on the pre-emption of state statutes that Congress previously sought to foster counsels against pre-emption. . . .").

[3] Maine Leg. Rec. S-1442 (June 20, 1997) (raising cigarette taxes decreases youth smoking, which "is the main goal here") (Sen. Goldthwait); U.S. Dept. of Transportation, *Reducing Tobacco Use: A Report of the Surgeon General*, 355 (2000) (increasing cigarette taxes would be an effective tool to deter smoking initiation among youth), available at <http://www.cdc.gov/tobacco/data_statistics/sgr/sgr_2000/00_pdfs/Chapter6.pdf> (visited November 3, 2007).

The point is not, as Respondents and the United States suggest, that the Synar Amendment or its regulations mandated these specific Maine provisions. Resp. Br. 20-21, 44-45; U.S. Br. 28. In fact, the Secretary of Health and Human Services specifically chose not to "mandate specific procedures," but instead allowed for flexibility, and therefore nonuniformity, by the States. Pet. Br. 3-4. The point, rather, is that Congress left the task of preventing youth access to tobacco entirely in the hands of the States, which had the authority without the Amendment to regulate carriers. While the parties may quibble over the meaning of "distributor," it is clear that the Secretary's rules contemplate state regulations to control any and all means and "outlets" of getting tobacco to children.[3] It would be strange for Congress, a mere two years after the Amendment's adoption, to counteract

[3] In the final 1996 rule, the Secretary explained

> States [must] have in place a law that prohibits the sale or distribution of any tobacco product to individuals under the age of 18 (minors) through any sales or distribution outlet. This would include sales or distribution from any location which sells at retail or otherwise distributes tobacco products to consumers. . . .

61 Fed. Reg. 1492 (1996). "The term 'outlet' is any location which sells at retail or otherwise distributes tobacco products to consumers *including (but not limited to)* locations that sell such products over-the-counter or through vending machines." 45 C.F.R. §96.130(a) (emphasis added). Delivery sales clearly fall within the scope of these rules.

that effort through a piece of legislation principally aimed at eliminating state tariffs and rate regulation.

Nor does it matter that Maine takes other steps to protect children from delivery sales of tobacco. Resp. Br. 43-44. Respondents do not dispute that there is a problem at the point of delivery in delivery sales if there is no verification, and have not shown that the other measures provide safeguards comparable to those in face-to-face sales. Without controls at the point of delivery, the other provisions have limited effect. *See* Tobacco Control Legal Consortium Br., 11-12.

3. The conclusion that the FAAAA does not oust §§1555-C(3)(C) and 1555-D is reinforced by the presumption against preemption, which fully applies here. Respondents' contention that the presumption does not apply because Congress has principal authority over interstate commerce (Resp. Br. 27-29) is misguided. Whether the presumption applies depends on the tradition and nature of the state law being preempted. *Dillingham*, 519 U.S. at 325. The sovereign States have been regulating public health since the Constitution, and myriad state laws controlling the delivery of unhealthful contraband have been on the books for generations. Not surprisingly, then, this Court applied the presumption when assessing the preemptive effect of the FAAAA in *Ours Garage*. 536 U.S. at 438; *see also Ours Garage*, Brief for the United States as *Amicus Curiae*, 15 ("The presumption is especially compelling in the present context, since 'the regulation of health and safety matters is

primarily, and historically, a matter of local concern.'" (Citation omitted)).

The presumption holds particular force here because of the broad implications of Respondents' position. The lower courts certainly recognized the public health problem resulting from their decisions, Pet. App. 28-29, 44-45, 98, and one of Respondents' *amici* relates that there may be 561 state public health laws preempted by this decision. Fed Ex Br. 19. Moreover, carriers have asserted that the FAAAA not only preempts the two Maine provisions, but also preempts state laws relating to alcohol deliveries. *See, e.g., Granholm v. Heald*, 544 U.S. 460 (2005), Brief for Cargo Airline Ass'n. as *Amicus Curiae*, at 8-17.[4]

Respondents' efforts to minimize the sweeping impact of their position, as illustrated by various laws cited by Petitioner and its *amici*, are unavailing.[5] First, Respondents discount "at least a third of the laws cited by Maine and its *amici*" on the ground that

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[4] The Cargo Airline Association is a trade association of carriers, including UPS. *Id.* at 1.

[5] Despite Respondents' characterizations, neither Petitioner nor the *amici* States "scoured" all jurisdictions looking for contraband laws that would be affected. Resp. Br. 21, 45-49. Instead, Petitioner listed as examples a few of the Maine laws that were on the books in 1994 and several extant today. Pet. Br. 23-24 nn.36-37. The *amici* States listed an illustrative handful, States' Br. 16 nn.12-17, as did the court of appeals, Pet. App. 27 n.13 ("There are many state laws barring the transport and delivery of contraband.").

"they make criminal only the 'knowing' transportation of certain items," a type of provision upheld by the First Circuit. Resp. Br. 46. Although it is true that Respondents have effectively conceded the validity of those statutes for purposes of this case by not filing a cross-petition, it bears noting that Respondents pointedly declined to " 'concede[ ]' that States can ban retailers entirely from shipping contraband items," or use evidence on the packages to effectively enforce such bans. Resp. Br. 24 n.8.

Some of Respondents' efforts to discount other types of state laws are also wide of the mark. For example, Respondents suggest (Br. 46-47) that the Lacey Act sanctioned the wildlife and plant contraband laws cited in Petitioner's opening brief, Pet. Br. 23 n.36. The Lacey Act did no such thing. That federal statute merely made it a separate federal offense to violate state fish, wildlife and plant laws, with no suggestion that it protected such state laws from constitutional challenge. 16 U.S.C. §3372(a)(2); *see Maine v. Taylor*, 477 U.S. 131, 139 (1986) (Lacey Act Amendments did not immunize state laws from constitutional challenge). Thus, these wildlife statutes, and many other state laws, might well be preempted by the FAAAA if Respondents' position is adopted by this Court. The presumption against preemption was designed precisely to protect such longstanding exercises of States' police powers, absent a more clear statement of congressional intent than is present here.

II. The FAAAA Does Not Preempt The Maine Provisions At Issue Because They Do Not Reference, or Have a Connection With, The "Service[s]" Of Motor Carriers Covered By The FAAAA.

The result is the same when the Maine provisions are examined to determine whether they have a reference to, or are connected with, the "service[s]" of motor carriers.

A. Sections 1555-C(3)(C) and 1555-D Do Not Reference the Service of Carriers Covered by the FAAAA.

As explained in Petitioner's opening brief, and confirmed in the United States' brief, the "reference to" prong only applies to statutes that operate "exclusively" on motor carriers covered by the FAAAA. Pet. Br. 42-43, 48; U.S. Br. 15 n.3. Sections 1555-C(3)(C) and 1555-D apply to all delivery services, including many that are not covered by the FAAAA. *See* Pet. Br. 42-43. Accordingly, the provisions do not run afoul of the "reference to" test.[8]

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[8] Respondents incorrectly characterize §1555-D as mandating that the State "provide lists of licensed and unlicensed tobacco retailers to carriers . . . and to no other entities." Br. 29. The statute requires the State to provide the list to a "delivery service" which is defined to include all persons who deliver packages, not just carriers. 22 Me. Rev. Stat. §§1551(1-C), 1555-D(1).

Respondents' assertion (Br. 36-37) that *District of Columbia v. Greater Washington Bd. of Trade*, 506 U.S. 125 (1992), sets forth a contrary controlling rule is wrong. *Greater Washington* preceded and was clarified by *Travelers*, in which the Court explained that there was no "reference to" an ERISA plan because the surcharges at issue were "imposed upon patients and HMO's, regardless of whether the commercial coverage or membership, respectively, is ultimately secured by an ERISA plan, private purchase, or otherwise," 514 U.S. at 656, and even though the bulk of the market was ERISA plans.

Moreover, Respondents' use of *Greater Washington* is founded on the erroneous assumption that "a carrier's services are 'essential'" to the operation of §1555-C(3)(C). Resp. Br. 37. They are not. As the United States observed in its amicus brief at the *certiorari* stage, "Maine's law ... would apply to small delivery vans and even commercial bicycle delivery services." U.S. Cert. Br. 9. If motor carriers covered by the FAAAA declined to deliver tobacco products altogether, §1555-C(3)(C) would still operate on retailers who sought to ship tobacco through other delivery services.

Finally, Respondents do not explain how the first sentence of §1555-D passes the "reference to" test but the second sentence of that provision (which merely enforces it) and §1555-C(3)(C) do not. And, all contraband delivery laws ban or control the delivery of certain cargo. Under Respondents' arguments, all contraband laws would be preempted under the

"reference to" test, even the first sentence of §1555-D which Respondents no longer contest.

B. Sections 1555-C(3)(C) and 1555-D Do Not Have the Requisite "Connection With" the Service of Carriers Covered by the FAAAA.

1. The Standard.

Respondents and the United States both assert that the proper "connection with" test asks whether the state law has a "forbidden significant effect." Resp. Br. 24 (quoting *Morales*, 504 U.S. at 388); U.S. Br. 8 (same). The post-*Morales* ERISA cases – which, as discussed above, assist in construing the FAAAA preemption provisions as well – refined the test to ask whether the state law has "acute.... economic effects." *See Travelers*, 514 U.S. at 668. The United States, however, argues that this test only applies to laws of general applicability. U.S. Br. 14 n.2. The Court has never so held, and for good reason.

Under the United States' view, a State can ban *everyone* from transporting tobacco, but cannot also specifically ban a subset of *everyone* – for example, retailers – from shipping tobacco except under certain conditions. This is so, even though (1) the public health objectives would be the same, (2) the impact on retailers would be less as it would allow them an opportunity to ship tobacco, and (3) the effect on the carriers would be the same if they simply chose not to provide an option with those conditions. Under such a

view, a state law prohibiting all persons from gambling would be valid, but a subsidiary law prohibiting persons from gambling on airplanes entirely or unless conforming with certain conditions would be preempted. There is no basis in this Court's jurisprudence for such senseless results. That is particularly so here, where the two provisions at issue do no more than implement a generally applicable ban on delivery of tobacco to children.

2. Section 1555-C(3)(C).

a. Respondents have failed to show that §1555-C(3)(C) has a forbidden connection with the service of motor carriers covered by the FAAAA. Section 1555-C(3)(C) instructs *retailers* that, should they wish to ship tobacco products, they must do so in a particular way. If a carrier does not wish to provide that service, it need not. Contrary to the United States' suggestion, the law imposes no obligations whatsoever on carriers. U.S. Br. 16; *see also* Resp. Br. 34. The first clause of §1555-C makes clear that subsection 1555-C(3)(C) and the other provisions of that section apply to "a tobacco retailer shipping tobacco products pursuant to a delivery sale." Neither the lower courts nor Petitioner, who enforces the law, have construed the provision contrary to its plain language so as to impose any obligations on carriers.

The court of appeals found (and neither Respondents nor the United States contest) that a state law banning carriers and other persons from knowingly

transporting tobacco products is permissible and has no connection with services under the FAAAA. Pet. App. 26 (upholding first sentence of §1555-D); Resp. Br. 24, 44; U.S. Br. 17, 29. Yet that is precisely the result of §1555-C(3)(C) should no motor carrier choose to offer the service specified in the provision. Should a carrier offer the service (because, presumably, it finds it profitable to do so), that is its voluntary business decision. To the extent §1555-C(3)(C) affects a carrier at all, it is merely by providing a business incentive to take an action it might not otherwise have taken. This Court has repeatedly held that state laws do not "relate to" a given activity merely by providing an incentive to engage in it. *Dillingham*, 519 U.S. at 332-33; *Travelers*, 514 U.S. at 660-62.

Respondents' basic supposition that §1555-C(3)(C) "dictates what delivery services a carrier must provide to certain packages" (Br. 32), therefore, is wrong because a carrier's choice to provide them is entirely optional with no regulatory repercussions.[7] Respondents do not explain how, if an outright ban is valid, a regulation that produces the same result if carriers choose not to provide an addressee-signature option would not be as well. This case is therefore readily distinguishable from *Morales* and *Wolens*

[7] Respondents mischaracterize carriers as enforcers of Maine's tobacco laws. Br. 17. When carriers, for profit, hand a package of tobacco to a child or deliver contraband tobacco, they are participants in illegal activity, not enforcers.

where the state had no authority to completely ban advertising or frequent flier miles.

The state advertising guidelines and unfair trade laws at issue in those cases, moreover, applied directly to the airlines covered by the ADA. Likewise, the statute at issue in *Egelhoff v. Egelhoff*, 532 U.S. 141, 147 (2001), "binds plan administrators to a particular choice of rules for determining beneficiary status." By contrast, carriers are not bound by §1555-C(3)(C) because it imposes no obligations upon carriers.

As discussed earlier, the most that could be said about the provision's impact is that it might provide an economic incentive to provide a new service. This Court's cases conclusively establish that such incentives do not amount to the requisite "connection." Therefore, the United States' response that the State is nonetheless indirectly "employing its coercive power to police the method by which carriers provide services in the state," Pet. App. 24, *cited in* U.S. Br. 17, is also without merit.[8] Indeed, the United States concedes that under §1555-D, Maine can prohibit carriers from transporting contraband, thus affecting the methods of delivery. Section 1555-C(3)(C) on the other hand requires a carrier to do nothing unless it

[8] In addition, the United States' proposed test, which relies upon the preexistence of the prescribed option, U.S. Br. 17, also places public health policy in the hands of private carriers in an unprecedented fashion.

wants to compete for the legal tobacco delivery market. And if the specified method of delivery is not available, the retailer is effectively banned from shipping the goods, a ban the United States and the court of appeals otherwise find constitutional.

This Court's decision in *Granholm* provides further confirmation of the validity of §1555-C(3)(C). The Court recognized that requirements such as adult signature and labels were "less restrictive" than bans. 544 U.S. at 490-91. And the FTC report relied upon by the Court explained that in addition to regulating the suppliers, States also could "impose similar requirements on package delivery companies as on retail stores," to "'check customers for valid identification to verify age,'" "such as by examining a picture identification." FTC, *Possible Anticompetitive Barriers to E-Commerce: Wine*, 29 (July 2003), available at http://www.ftc.gov/os/2003/07/winereport2.pdf (visited October 29, 2007). Of course, Maine does not go that far, for §1555-C(3)(C) does not impose "requirements on package delivery companies." If States could enact even a law directly imposing those requirements, it follows *a fortiori* that Maine's provisions are valid.

b. Respondents make no effort to, and apparently concede they cannot, meet the "acute" effects standard with respect to §1555-C(3)(C). Their effort to meet the lesser standard of "forbidden significant effect" (Br. 9-13, 32-34) also falls short, even on the mistaken assumption that the incentives the provision creates for carriers implicates the "connection with" test.

First, the impact on carriers of the first sentence of §1555-D is likely greater than that of §1555-C(3)(C). As the court of appeals reasoned, a carrier can comply with §1555-D simply by declining to transport the tobacco. Pet. App. 26. Respondents have not explained why the same declination does not suffice for §1555-C(3)(C).

Second, Respondents' evidentiary case rests on conclusory assertions, without the benefit of any studies, statistics, data or hard evidence – and this from a company that studies subjects as "mundane" as where drivers should place their ignition keys. Resp. Br. 7-8.[9] UPS has various procedures and systems in place which on their face seem easily adaptable to provide an addressee-signature option; UPS fails to present evidence why it is burdensome to do so. For example, UPS provided no evidence that its preexisting procedure of multiple delivery efforts with the driver leaving a notice when the recipient is not readily available (which we all have found on our front door) will not suffice. *See* Pet. Br. 14 & n.27. There is no requirement in the law that the driver search out an *addressee* any more than he must search out a *recipient* over the age of 21 before

[9] It should be noted that most of Respondents' case in support of their motion for summary judgment is based upon the declaration of a UPS employee submitted after her deposition and with the motion. J.A. 39-65. As a result, the conclusory statements made therein went largely untested, are not supported with any data, study or statistics, and in some instances contradict her previous testimony.

quickly leaving the notice under its present age-verification option. In sum, UPS procedures do not require the driver to wait, and there is nothing in §1555-C(3)(C) mandating that he do so.

UPS's computer-DIAD system has information about shippers, the commodities that they ship, and consignees, and UPS's DIADs provide alerts for signature and age options and can be programmed to generate a prompt for a particular shipper or package to direct the driver's behavior. J.A. 101-03; Pet. Br. 12-13; Resp. Br. 11 n.3. There is no explanation why that system cannot easily and inexpensively be utilized for addressee-signature options. While it may require some minor adjustments, UPS updates its systems constantly and has yet to present evidence showing that the costs of doing so are significant. Respondents' claims of "economic infeasibility" (Br. 32-33 & nn.11 & 13) are based on no feasibility studies, data or statistics – only bare unsupported, conclusory assertions. *E.g.*, J.A. 55, 59.

Finally, Respondents argue that even if a *new* option of addressee-signature confirmation costs only a few cents more than preexisting options, that in and of itself shows that Maine's law "relates to carrier" prices, and thus *ipso facto* is preempted. Resp. Br. 33. Of course, *Morales*, the ERISA cases, and Respondents' own concessions show that it is not *any* effect on prices that requires preemption but only an effect that is "acute" or at least "significant," and a few cents a package that UPS can pass on to the customers is not that.

3. Section 1555-D.

a. The second sentence of §1555-D does not have a forbidden "connection" with motor carriers services either. Respondents fail to explain how the first sentence of §1555-D is not preempted under ERISA analysis but the second sentence is. Because Respondents accept that Maine can prevent the knowing delivery of contraband tobacco under §1555-D, logically Maine must be able to enforce those laws. Petitioner has repeatedly expressed concern that the court of appeals' reasoning disallows the use of evidence of markings or labels in a court of law against carriers to prove knowledge – with or without the evidentiary presumption. This would leave §1555-D as well as any other contraband law unenforceable against carriers. Pet. Br. 46-47. Insofar as we can tell, that is precisely Respondents' position.

Respondents' statement that Maine can enforce the prohibition of §1555-D with "evidence of actual knowledge," Br. 44, begs the question. Respondents have not conceded, and therefore presumably disagree, that evidence on the outside of the box (markings and labels) is "evidence of actual knowledge." Respondents fail to identify any evidence upon which §1555-D or a ban against furnishing tobacco to children such as §1555-B(2) could be enforced against a carrier. Respondents suggest (Br. 44) that the decision in *Robertson v. State of Washington Liquor Control Board*, 10 P.3d 1079 (Wash. App. Ct. 2000), shows that a case can be made against a trucker without relying on imputed knowledge. The decision

does nothing of the sort. In that case, the trucker lost his vehicle to forfeiture because he failed to prove that he did not know he was hauling cigarettes. From the decision, we do not know what evidence was presented. All we know is that under Respondents' approach, the State could not use cigarette markings on packages to rebut a trucker's assertion that he did not know he was transporting cigarettes.

b. Without such evidence, neither the first sentence of §1555-D nor §1555-B(2) (nor, for that matter, any ban on contraband) can be effectively enforced against a carrier. On the other hand, if the evidence can be used without the evidentiary presumption, the practical effect is the same: in order to avoid prosecution a carrier must look for markings and labels, J.A. 34, 36, 37, and do something about them, *i.e.*, make sure the retailer or recipient is licensed, or not hand over the package to a child. The evidentiary presumption does little to change the effect on carriers or the alleged patchwork of state laws.

c. The United States presents a strained reading of Maine's law, suggesting that the first part of §1555-D is a law of general application but the evidentiary provision is not. U.S. Br. 21. That is not the case. Both portions of the provision apply to "a person," *i.e.*, to all *persons*, not just delivery persons or carriers. While the lists of licensed and unlicensed retailers are provided to delivery services (which encompasses a group larger than just motor carriers), §1555-D is enforced against anyone, and providing

the list to delivery services under §1555-D(4) simply gives them the opportunity to better protect themselves.[10]

Respondents have not shown that the second sentence of §1555-D imposes a significant burden, much less an "acute" one. The only estimate of additional time to comply with Maine's law is that it costs less than a penny a package to look at the label. Pet. Br. 12. The suggestion that it is burdensome to notice markings such as those found at J.A. 34, 36 and 37 is absurd.[11]

Respondents have failed to present any evidence that UPS's computer-DIAD system cannot easily handle the identification of licensees. Indeed, UPS continued to deliver tobacco to licensees in Maine using its preexisting systems. Resp. Br. 10.[12] And, as part of its agreement with New York, it appears that UPS is doing virtually the same tasks about which

[10] Respondents pointed out that the list of unlicensed retailers was improperly placed on the Petitioner's website. That error was corrected.

[11] UPS's "additional training" (Br. 31) consisted of a few regularly-scheduled three-to five-minute work-shift meetings in Maine, J.A. 77, revealing just how simple it is to comply.

[12] Respondents' claim of "abandoning lawful deliveries from Maine-licensees" (Br. 31) is unfounded. Respondents do not challenge Maine's laws that require a delivery retailer to be licensed, or that tobacco sold by a nonlicensee is contraband. 22 Me. Rev. Stat. §§1555-C(1) & (7); Resp. Br. 7, 43. There is no evidence that any retailer had such a license, or that UPS declined business from a licensed retailer.

they complain in this case without any identified "far-reaching disruptions." Pet. Br. 15-16.

Respondents' assertion (Br. 30) that §1555-D imposes a "Herculean task" with respect to processing and handling packages with tobacco markings or labels on them is wildly overstated. As noted in our opening brief, the DIAD system already can alert the driver regarding a particular shipper or address (J.A. 101-03), and procedures are already in place for packages that cannot be delivered. Pet. Br. 13-14 & n.27. In other words, UPS already has uniform procedures to deal with tobacco packages in the same manner as other types of material, such as those containing alcohol and firearms.

At the core of Respondents' argument is the suggestion that the whole system will break down if UPS's sorting processes are just a few minutes late. Resp. Br. 9. There is no evidence such a delay will occur, and any such delay arises out of compliance with the first sentence of §1555-D that Respondents no longer contest. Moreover, UPS's system contemplates additional time for a variety of actions, such as identifying damaged packages, identifying packages with hazardous waste, alcohol or firearms, weather problems, and truck breakdowns. J.A. 69-70. Respondents fail to present any data, statistics or study that Maine's law would acutely or significantly affect UPS's operations in light of these other time-consuming issues, which appear to be handled without a systematic breakdown. Much more is required

before a state law has a "significant" or "acute" effect such that it is preempted by a "related to" provision.

CONCLUSION

The decision of the court of appeals should be reversed.

Respectfully submitted,

G. STEVEN ROWE
Attorney General
PAUL STERN
Deputy Attorney General
(Counsel of Record)
MELISSA REYNOLDS O'DEA
CHRISTOPHER C. TAUB
PETER B. LAFOND
Assistant Attorneys General

6 State House Station
Augusta, ME 04333-0006
(207) 626-8568
(207) 287-3145 (fax)

Counsel for Petitioner

57a
(11)
340

No. 06-457

In the Supreme Court of the United States

G. STEVEN ROWE, ATTORNEY GENERAL OF THE STATE OF MAINE, PETITIONER

v.

NEW HAMPSHIRE MOTOR TRANSPORT ASSOCIATION, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENTS

PAUL D. CLEMENT
Solicitor General
Counsel of Record

PETER D. KEISLER
Assistant Attorney General

EDWIN S. KNEEDLER
Deputy Solicitor General

DOUGLAS HALLWARD-DRIEMEIER
Assistant to the Solicitor General

MARK B. STERN
CHRISTINE N. KOHL
Attorneys

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

D.J. GIBBIN
General Counsel

PAUL M. GEIER
Assistant General Counsel for Litigation

DALE C. ANDREWS
Deputy Assistant General Counsel for Litigation

PAUL SAMUEL SMITH
Senior Trial Attorney
Department of Transportation
Washington, DC 20590

QUESTIONS PRESENTED

The Federal Aviation Administration Authorization Act of 1994 (FAAA Act) provides, with certain exceptions inapplicable here, that "a State * * * may not enact or enforce a law * * * related to a price, route, or service of any motor carrier * * * with respect to the transportation of property." 49 U.S.C. 14501(c)(1). See also 49 U.S.C. 41713(b)(4)(A). The questions presented in this case are:

1. Whether the FAAA Act preempts a state law that requires a seller of tobacco products to use only delivery services that will take statutorily prescribed actions to ensure that the purchaser is not a minor.

2. Whether the FAAA Act preempts a state law that effectively requires a delivery service to change its package-processing procedures in order to avoid being deemed to have knowledge that a package contains tobacco products.

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INTEREST OF THE UNITED STATES

This case concerns whether the preemption provisions of the Federal Aviation Administration Authorization Act of 1994 preempt a Maine law regulating the delivery of tobacco products. The United States shares Maine's goal of reducing youth tobacco use, but also has an interest in the fulfillment of the FAAA Act's purpose to eliminate the burdens of state regulation of motor carrier services.

STATEMENT

1. In the Airline Deregulation Act of 1978 (ADA), Pub. L. No. 95-504, 92 Stat. 1705, Congress deregulated the airline industry, adopting instead a policy of "maximum reliance on competitive market forces." ADA § 3(a), 92 Stat. 1706. "To ensure that the States would not undo federal deregulation with regulation of their own," *Morales* v. *TWA*, 504 U.S. 374, 378 (1992), as well as to "prevent conflicts and inconsistent regulation[]," H.R. Rep. No. 1211, 95th Cong., 2d Sess. 15 (1978), the ADA also preempted any state laws "relating to rates, routes, or services of any air carrier." ADA § 4(a), 92 Stat. 1708 (49 U.S.C. 41713(b)(1)). In *Morales*, this Court recognized that the ADA's preemption language was "conspicuous for its breadth." 504 U.S. at 384.

In 1994, Congress extended to motor carriers "the identical intrastate preemption of prices, routes and services as that originally contained in" the ADA for airlines. H.R. Conf. Rep. No. 677, 103d Cong., 2d Sess. 82, 83 (1994) (H. Rep. 677). The FAAA Act contains two preemption provisions modeled on the ADA—one for air carriers and affiliated motor carriers, and the other for unaffiliated motor carriers. Each provides that "a State * * * may not enact or enforce a law * * * related to a price, route, or service" of a carrier respecting property transportation. 49 U.S.C. 14501(c)(1), 41713(b)(4)(A).

The "[g]eneral rule" of preemption applies "[e]xcept as provided" in specified provisions. 49 U.S.C. 14501(c)(1), 41713(b)(4)(A). Among the "[m]atters not covered" by the

preemption provision are a State's "safety regulatory authority * * * with respect to motor vehicles"; authority "to impose highway route controls or limitations based on the size or weight of the motor vehicle or the hazardous nature of the cargo"; and certain motor carrier insurance requirements. 49 U.S.C. 14501(c)(2)(A), 41713(b)(4)(B)(i). The transportation of household goods and certain tow-truck regulations are also excluded. 49 U.S.C. 14501(c)(2)(B) and (C), 41713(b)(4)(B)(ii).

Although States are permitted to regulate in those areas, other provisions of federal law limit such state regulation. For example, whereas Sections 14501(c)(2)(A) and 41713(b)(4)(B)(i) permit States to adopt motor vehicle safety regulations, another section provides that "[a] State may not enforce a State law or regulation on commercial motor vehicle safety that the Secretary of Transportation decides under this Section may not be enforced." 49 U.S.C. 31141(a).[1]

2. The State of Maine has, for some time, made it unlawful for "[a] person" to "sell, furnish or give away a tobacco product to any person under 18 years of age." 22 Me. Rev. Stat. Ann. § 1555-B(2) (West Supp. 2006) (22 Me. Stat.); *id.* § 1555 (Supp. 1996). A person who violates that provision is subject to civil fines. 22 Me. Stat. § 1555-B(8). Prior to 2003, the State permitted the retail sale of tobacco products "only in a direct, face-to-face exchange in which the purchaser may be clearly identified and through the mail under procedures approved by the [State] to provide reliable verification that the purchaser is not a minor." *Id.* § 1555-B(1) (Supp. 1997). In 2003, Maine enacted An Act to Regulate the Delivery and Sales of Tobacco Products and to Prevent the Sale of Tobacco Products to Minors, 2003 Me. Laws ch. 444 (Tobacco Delivery

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[1] See also 49 U.S.C. 5112(a)(2) and (b)(1) (States authorized to designate hazardous material routes pursuant to "regulation standards" prescribed by the Secretary); 49 U.S.C. 31111(b) (prohibiting States from setting motor vehicle length limitations below federal floor); 49 U.S.C. 31113(a)(1) (prohibiting States from "impos[ing] a vehicle width limitation of more or less than 102 inches on a commercial motor vehicle").

Law). That law permits a licensed tobacco retailer to make "delivery sales" of tobacco products directly to consumers pursuant to orders by telephone or the internet, provided that the retailer takes certain measures to ensure that such sales are not to minors. See 22 Me. Stat. § 1555-C(1), (2) and (3).

Section 1555-C sets out the "requirements [that] apply to delivery sales of tobacco products within the State." The retailer must provide the delivery service with the age of the purchaser, and clearly mark the outside of the package with the retailer's name and license number and indicate that it contains tobacco. 22 Me. Stat. § 1555-C(3)(A) and (B). The statute further requires that the tobacco retailer "utilize a delivery service that imposes the following requirements":

> (1) The purchaser must be the addressee;
>
> (2) The addressee must be of legal age to purchase tobacco products and must sign for the package; and
>
> (3) If the addressee is under 27 years of age, the addressee must show valid government-issued identification that contains a photograph of the addressee and indicates that the addressee is of legal age to purchase tobacco products.

Id. § 1555-C(3)(C). The statute also requires the retailer to provide "delivery instructions" informing the delivery service of the subsection's requirements and that "state law requires compliance with the requirements." *Id.* § 1555-C(3)(D). The statute provides for fines, injunctions, and forfeiture in the case of violations. *Id.* § 1555-C(3)(E), (F), (7) and (8).

Section 1555-D addresses the "[i]llegal delivery of tobacco products." Its first sentence provides that "[a] person may not knowingly transport or cause to be delivered to a person in [Maine] a tobacco product purchased from a person who is not licensed as a tobacco retailer in [Maine]," unless the delivery is to a licensed tobacco distributor or retailer. 22 Me. Stat. § 1555-D. The second sentence provides that "[a] person is *deemed to know* that a package contains a tobacco product

if the package is marked in accordance with the requirements of [Section 1555-C(3)(B)] or if the person receives the package from a person listed as an unlicensed tobacco retailer by the Attorney General." *Ibid.* (emphasis added). The statute requires the Attorney General to provide confidential "lists of licensed tobacco retailers and known unlicensed tobacco retailers" to delivery services. *Id.* § 1555-D(1).

3. Respondents, non-profit trade associations of motor carriers, brought suit against petitioner, seeking to enjoin enforcement of several provisions of the State's Tobacco Delivery Law. The district court held both Section 1555-C(3)(C) and the second sentence of Section 1555-D preempted under the FAAA Act. Pet. App. 54-66.

4. The First Circuit affirmed. It rejected petitioner's contention that the FAAA Act preempts only state laws that impose traditional economic regulation on carriers, such as entry controls and tariff filing requirements, not laws that protect public health and welfare pursuant to a state's traditional police power. The court concluded that—given the broad statutory text, the Act's structure, the overall legislative history, and the focus of this Court's decisions in *Morales* and *American Airlines, Inc.* v. *Wolens*, 513 U.S. 219 (1995), on the effect that a state law has on carrier operations—the Act is not so limited. Pet. App. 14-21.

The court next held that Section 1555-C(3)(C) is preempted under the FAAA Act for two reasons. First, it "expressly references a carrier's service of providing the timely delivery of packages." Pet. App. 23. Second, "[t]he statute prescribes the method by which a carrier operating in Maine must deliver packages containing tobacco products in a way that would affect the ability of the carrier to meet package-delivery deadlines." *Ibid.* In response to petitioner's contention that Section 1555-C(3)(C) regulates tobacco retailers rather than carriers, the court explained that that argument "would lead to the untenable result of permitting states to regulate carrier services indirectly by regulating shippers." *Id.* at 24.

The court of appeals held that the FAAA Act does not preempt the first sentence of Section 1555-D, which prohibits any person from knowingly delivering tobacco products from a retailer not licensed by the State because that part of Section 1555-D does not require carriers to "modify their delivery methods other than by declining to transport a product that Maine has legitimately banned" Pet. App. 26. However, the second sentence of Section 1555-D, which imputes knowledge of a package's tobacco contents to a carrier in certain circumstances, "has the effect of forcing [carriers] to change [their] uniform package-processing procedures" and "prescrib[es] how carriers must operate." *Id.* at 28. Thus, the court held that part of Section 1555-D to be preempted. *Ibid.*

SUMMARY OF ARGUMENT

The FAAA Act implements Congress's policy to deregulate the transportation industry, and its determination that the States should not fill the void. By using the same broad language in the FAAA Act as the ADA, Congress endorsed this Court's recognition in *Morales* of the ADA's sweeping preemptive effect. Petitioner relies on subsequent decisions interpreting similar language in the preemption provision of the Employee Retirement Income Security Act (ERISA), but those decisions do not undermine *Morales*. There are significant differences between ERISA, in which a pervasive federal regulatory scheme preempts the field, and the FAAA Act, which reflects Congress's policy to *de*regulate motor carriers. In any event, recent ERISA decisions continue to recognize that state regulations that have a direct, significant effect on central aspects of ERISA plans are preempted, while laws of general applicability with only a tenuous connection are not.

Maine's Tobacco Delivery Law has a significant, direct effect on a central feature of motor carriers' services—their ability efficiently to deliver millions of packages each day using uniform national procedures. Maine dictates particular methods, unique to Maine, for delivering packages containing

tobacco products. Most significantly, Maine requires a delivery service to obtain the signature of the package's *addressee*, rather than another adult at the delivery address. The difference is critical; waiting for an addressee to come to the mail room (or to learn that he will not come) can delay hundreds of other packages. Moreover, by imputing to carriers knowledge of a package's tobacco contents whenever the shipper's name appears on a confidential list or the package is marked, Maine forces carriers to alter their otherwise uniform modes of operation to ensure that they do identify such packages. Although it may be efficient from Maine's perspective for it to impose the burden of detecting unlicensed tobacco sales on carriers, the FAAA Act does not permit it. If Maine can adopt its own method for tobacco deliveries, so too can other States, and for other products also. Such a patchwork of state regulation, preventing carriers from utilizing uniform, market-driven procedures, is precisely what the FAAA Act prohibits.

The FAAA Act does not preempt only economic regulation, nor does it contain a broad exception for state regulations motivated by public health and safety policies. Congress rejected a bill that would have had that limitation. Moreover, Congress enacted specific exceptions to the preemptive reach of the FAAA Act, but there is no general exception for health and safety rules. To engraft such a broad exception would dramatically undermine Congress's purposes. Whereas the federal government retains authority to protect uniformity with respect to the specified exceptions, there is no similar authority over state health and safety regulations generally.

ARGUMENT

I. THE FAAA ACT PREEMPTS STATE REGULATIONS THAT WOULD FRUSTRATE THE ABILITY OF MOTOR CARRIERS TO PROVIDE UNIFORM NATIONAL SERVICES

1. The FAAA Act marks an extension of Congress's policy of deregulation begun in the ADA with respect to the airline industry. Although there was a "movement toward deregula-

tion [of motor carriers] by some individual states," there remained a "patchwork of regulation" that "cause[d] significant inefficiencies, increased costs, reduction of competition, inhibition of innovation and technology and curtail[ed] the expansion of markets." H. Rep. 677, at 87. The "sheer diversity" of state regulation was "a huge problem for national and regional carriers attempting to conduct a standard way of doing business." *Ibid.* Congress intended instead that "[s]ervice options * * * be dictated by the marketplace[,] and not by an artificial regulatory structure." *Id.* at 88.

Those problems were highlighted by a Ninth Circuit ruling that Federal Express was entitled to the benefit of the ADA's preemption provision because it qualified as an air carrier for purposes of that statute. *Federal Express Corp.* v. *California Pub. Utils. Comm'n*, 936 F.2d 1075, 1077-1079 (1991), cert. denied, 504 U.S. 979 (1992). Federal Express's competitors, such as United Parcel Service, that did not qualify as air carriers remained subject to state regulation, "putting [them] at a competitive disadvantage." H. Rep. 677, at 87. The FAAA Act "level[ed] the playing field" by "extend[ing] to all affected carriers * * * the identical intrastate preemption of prices, routes and services as that originally contained" in the ADA. *Id.* at 82-83; see 49 U.S.C. 14501(c)(1), 41713(b)(4)(A).

Congress's use of the ADA's language reflects its agreement with "the broad preemption interpretation adopted by the United States Supreme Court in *Morales*." H. Rep. 677, at 83. In *Morales*, the Court explained that "the key phrase * * * 'relating to' * * * express[es] a broad pre-emptive purpose." 504 U.S. at 383. The Court noted that, in construing the words "relate to" in ERISA, 29 U.S.C. 1144(a), it had held that "a state law 'relates to' an employee benefit plan, and is pre-empted by ERISA, 'if it has a connection with or reference to such a plan.'" *Morales*, 504 U.S. at 384 (quoting *Shaw* v. *Delta Air Lines, Inc.*, 463 U.S. 85, 97 (1983)). The Court adopted the same standard for the ADA: "State enforcement

actions having a connection with or reference to airline 'rates, routes, or services' are pre-empted." *Ibid.*

2. *Morales* rejected the argument that only state laws that actually prescribe rates, routes, or services are preempted. As the Court explained, such an interpretation would effectively rewrite the statute by substituting the word "*regulate*" for the phrase "relating to." 504 U.S. at 385. The Court also found unconvincing the argument that "only state laws specifically addressed to the airline industry are pre-empted." *Id.* at 386. Such an interpretation would "creat[e] an utterly irrational loophole." *Ibid.* The Court noted that, under ERISA, a state law "may 'relate to' a benefit plan, and thereby be pre-empted, even if the law is not specifically designed to affect such plans, or the effect is only indirect." *Ibid.* (quoting *Ingersoll-Rand Co.* v. *McClendon*, 498 U.S. 133, 139 (1990)); see also *ibid.* (citing *Metropolitan Life Ins. Co.* v. *Massachusetts*, 471 U.S. 724, 739 (1985) (state law mandating benefits in group insurance policies "relates to" an ERISA plan that purchases such policies)). Applying those principles, the Court held in *Morales* that guidelines issued by state attorneys general regarding airline fare advertising, which purported to enforce generally applicable consumer protection laws, 504 U.S. at 379, were preempted because the guidelines contained an "express reference" to airline fares, and because it was "clear as an economic matter" that the guidelines had "the forbidden significant effect" on airline fares, *id.* at 388.

Three years later, in *American Airlines, Inc.* v. *Wolens*, 513 U.S. 219 (1995), the Court held, applying *Morales*, that the ADA precludes States from applying consumer fraud statutes to airline frequent flyer programs. The Court held that the States' use of those statutes "to guide and police the marketing practices of the airlines," conflicted with "the ADA's purpose to leave largely to the airlines themselves, and not at all to States, the selection and design of marketing mechanisms appropriate to the furnishing of air transportation services." *Id.* at 228. The Court distinguished such claims from

breach-of-contract actions for violating an airline's own frequent flyer program. *Id.* at 228-233. The latter merely holds an airline to its "self-imposed undertakings," "privately ordered obligations" that reflect the airline's own "business judgments * * * about its rates and services." *Id.* at 228-229.

3. Petitioner urges the Court not to "rely on the expansive character of [the ADA's] literal language," which the Court applied in *Morales* and *Wolens*, and the Conference Report endorsed. Pet. Br. 29. Petitioner urges the Court instead to apply the assertedly narrower standard of preemption that the Court has developed in subsequent ERISA decisions, which eschew the broad literal meaning of "related to" in favor of looking to "the objectives of the ERISA statute as a guide to the scope of the state law that Congress understood would survive." *Id.* at 23 (quoting *New York State Conf. of Blue Cross & Blue Shield Plans* v. *Travelers Ins. Co.*, 514 U.S. 645, 656 (1995) (*Travelers*)). But the later ERISA cases should not be read as having narrowed the broad reading that the Court gave to the ADA in *Morales* and *Wolens*. The Court's reliance on ERISA precedents in *Morales* is not a sufficient basis for interpreting the two statutes in lock step in light of differences in statutory text and regulatory context.

a. Because there are significant distinctions between ERISA and the ADA and FAAA Act, it is not clear that the Court's more recent ERISA decisions are easily transferred to the FAAA Act. Apart from the "related to" language, ERISA's preemption provision, 29 U.S.C. 1144(a), is phrased differently from the ADA or FAAA Act. Section 1144(a) provides that ERISA "shall supersede any and all State laws insofar as they * * * relate to any employee benefit plan described in" ERISA. *Ibid.* The statute's reference to federal law "supersed[ing]" state law reflects Congress's intent "to ensure that plans and plan sponsors would be subject to a uniform body of benefits law," *i.e.*, federal ERISA law. *Ingersoll-Rand*, 498 U.S. at 142. Thus, Section 1144(a) represents a kind of express field preemption, in which ERISA's

"scheme of federal regulation [is] so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it." *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). Indeed, four Members of this Court have stated that ERISA pre-emption should be analyzed under principles of "field pre-emption." *Egelhoff* v. *Egelhoff*, 532 U.S. 141, 153 (2001) (Scalia, J., joined by Ginsburg, J., concurring); *ibid.* (Breyer, J., joined by Stevens, J., dissenting).

The ADA and FAAA Act's preemption provisions differ from ERISA's in both their text and purpose. The ADA and FAAA Act were adopted as part of the *deregulation* of transportation industries, in order "[t]o ensure that the States would not undo federal deregulation with regulation of their own." *Morales*, 504 U.S. at 378. Thus, the ADA and FAAA Act do not state, as ERISA does, that some comprehensive federal regulatory scheme "supersede[s]" state regulations related to the object of that federal regulation. Rather, the ADA and FAAA Act provide in clear and direct terms that "a State * * * may not enact or enforce a law * * * related to a price, route, or service" of a carrier. 49 U.S.C. 14501(c)(1), 41713(b)(1), 41713(b)(4)(A). Because ERISA's preemption of state law corresponds to a field-occupying federal scheme, it is appropriate to "look * * * to the objectives of the ERISA statute as a guide to the scope of the state law that Congress understood would survive." *Travelers*, 514 U.S. at 656. Because the FAAA Act reflects Congress's policy to *de*regulate motor carriers so that "[s]ervice options will be dictated by the marketplace[,] and not by an artificial regulatory structure," H. Rep. 677, at 88, the Court should continue to give effect to the "broad pre-emptive purpose" that the Court recognized in *Morales*, 504 U.S. at 383.

b. To the extent the Court looks to ERISA cases in interpreting the ADA and FAAA Act's preemption provisions, the more recent ERISA cases do not erect as high a hurdle for establishing preemption as petitioner maintains. Rather, the Court continues to find state laws preempted if they affect, in

a way that is not tenuous, remote, or peripheral, ERISA plans' ability to operate nationally in a uniform manner.

State regulations may "relate to" ERISA, and thus be pre-empted, in numerous ways. A state law that "acts immediately and exclusively upon ERISA plans * * * or where the existence of ERISA plans is essential to the law's operation[,] * * * that 'reference' will result in pre-emption." *California Div. of Labor Standards Enforcement* v. *Dillingham Constr., N.A.*, 519 U.S. 316, 325 (1997). Such a law is preempted without regard to its impact. For example, in *Mackey* v. *Lanier Collection Agency & Service, Inc.*, 486 U.S. 825 (1988), the Court held preempted a state law that barred garnishment of "[f]unds or benefits of [an] * * * employee benefit plan or program subject to" ERISA, even though the law gave *greater* protection to ERISA benefits. *Id.* at 828 (quoting Ga. Code Ann. § 18-4-22.1 (1982)). Alternatively, "[a] law that does not refer to ERISA plans may yet be pre-empted if it has a 'connection with' ERISA plans." *Dillingham*, 519 U.S. at 325. To determine whether such a "forbidden connection" exists, the Court considers both "the objectives of the ERISA statute" and "the nature of the effect of the state law on ERISA plans." *Ibid.* (citing *Travelers*, 514 U.S. at 656, 658-659).

In assessing the "nature of the effect of the state law," the Court has found preemption where a state statute interferes with "a central matter of plan administration," such as the payment of benefits. *Egelhoff*, 532 U.S. at 148. In *Egelhoff*, the Court held preempted as applied to ERISA benefits a Washington statute that "provides that the designation of a spouse as the beneficiary of a nonprobate asset is revoked automatically upon divorce." *Id.* at 143. The Court explained that the statute "interferes with nationally uniform plan administration," which was "[o]ne of the principal goals of ERISA." *Id.* at 148. While the Court noted that "all state laws create some potential for a lack of uniformity," those, like Washington's, that "affect[] an ERISA plan's 'system for processing claims and paying benefits' impose 'precisely the

burden that ERISA pre-emption was intended to avoid.'" *Id.* at 150 (quoting *Fort Halifax Packing Co.* v. *Coyne*, 482 U.S. 1, 10 (1987)). See also *FMC Corp.* v. *Holliday*, 498 U.S. 52, 60 (1990) (holding Pennsylvania's antisubrogation statute pre-empted because "[t]o require plan providers to design their programs in an environment of differing state regulations would complicate the administration of nationwide plans").

On the other hand, where the challenge is to "generally applicable laws regulating 'areas where ERISA has nothing to say,'" the Court has upheld the laws "notwithstanding their incidental effect on ERISA plans." *Egelhoff*, 532 U.S. at 147-148 (quoting *Dillingham*, 519 U.S. at 330). The cases principally relied upon by petitioner fall into that category. *Travelers*, for example, upheld a surcharge to hospital patients covered by commercial insurance, but not those covered by Blue Cross, even though the differential could "have an indirect economic effect on choices made by insurance buyers, including ERISA plans." 514 U.S. at 659. The Court noted that ERISA does not preempt "laws of general applicability" that have "only a tenuous, remote, or peripheral connection with covered plans." *Id.* at 661 (quoting *District of Columbia* v. *Greater Wash. Bd. of Trade*, 506 U.S. 125, 130 n.1 (1992)). See *Dillingham*, 519 U.S. at 330, 332 (upholding California's prevailing wage law because it was "quite remote from the areas with which ERISA is expressly concerned," and its effect on ERISA plans was only indirect, "provid[ing] some measure of economic incentive to comport with the State's requirements" if they wanted to provide apprentices to public works projects); *De Buono* v. *NYSA-ILA Med. & Clinical Servs. Fund*, 520 U.S. 806, 816 (1997) (New York tax on hospitals not preempted as applied to a hospital run by an ERISA plan because its effect would have been the same, albeit indirect, if the plan had bought services from independent hospitals, and the Court refused to read ERISA as preempting "[a]ny state tax, or other law, that increases the costs of providing benefits to covered employees").

II. MAINE'S TOBACCO DELIVERY LAW OPERATES IN A DIRECT WAY ON THE HANDLING AND DELIVERY OF PARCELS, CORE ASPECTS OF CARRIERS' SERVICES

The court of appeals correctly held that the challenged provisions of Maine's Tobacco Delivery Law are preempted under the foregoing principles. That law has a "significant effect," *Morales*, 504 U.S. at 388, on the manner in which parcels containing tobacco are delivered, a matter "central" to the services a carrier provides. *Egelhoff*, 532 U.S. at 148. That effect is not, as petitioner contends, "related to" a carrier's service in some merely theoretical sense at "the furthest stretch of [the phrase's] indeterminacy." Pet. Br. 23 (quoting *Travelers*, 514 U.S. at 655). Nor is it "tenuous, remote or peripheral." *Id.* at 28 (quoting *Morales*, 504 U.S. at 390). Rather, the challenged provisions "relate to" a carrier's service in a very direct way, specifying the manner in which a carrier is to deliver packages containing tobacco and the kind of receipt it must obtain, and imputing to carriers knowledge of a package's contents. Disparate state laws specifying distinct procedures for delivering packages on the basis of their contents threaten precisely the kind of "patchwork of regulation," precluding national carriers from "conduct[ing] a standard way of doing business," that Congress sought to preempt. H. Rep. 677, at 87; *Egelhoff*, 532 U.S. at 150.

A. Section 1555-C(3)(C)

1. The court of appeals held that the FAAA Act preempts Section 1555-C(3)(C) of the Tobacco Delivery Law, which requires a tobacco retailer to use a "delivery service" that, in turn, "imposes" several "requirements." The delivery service must require that the addressee be the purchaser, must require that the addressee sign for the package and be of legal age to purchase tobacco, and, if the addressee is under age 27, must verify, by obtaining government-issued photo identification, that the addressee is of legal age. 22 Me. Stat. § 1555-C(3)(C). The "requirements" of Section 1555-C(3)(C)—in

particular, that the carrier obtain the addressee's (*i.e.*, the purchaser's) signature—have a "forbidden significant effect" on motor carrier operations. *Morales*, 504 U.S. at 388.[2]

As the court of appeals observed, "[d]elays in searching for the purchaser, making multiple delivery attempts if the purchaser cannot be located, obtaining the purchaser's signature, and verifying the purchaser's age," as a consequence of Section 1555-C(3)(C), "all could affect timely deliveries." Pet. App. 23. When a carrier contracts to deliver a package at a workplace, the named addressee "and the delivery area will [sometimes] be located in different buildings, or on different floors of the same building," or "might otherwise be unavailable to come to the delivery area." J.A. 57. "In some instances, it could take several minutes just to determine that the [addressee] is not even available to sign, in which case the process would have to be repeated the next day." *Ibid.* Some types of workers "rarely (if ever) would be available to sign for such a package at a fixed address," and the carrier "might have to make repeated, futile attempts to deliver." *Ibid.* The purchaser could not solve the problem by having the package shipped to a home address, because another adult who was at home could not sign for it, nor could the purchaser designate another adult as the addressee, because that too would violate the statute. Moreover, the statute's impact is not limited to tobacco packages; it affects all the other packages that are

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[2] Petitioner contends (Br. 43-44 & nn.47, 48) that *De Buono* adopted a new "acute * * * economic effects" standard for ERISA preemption. That is not so. The Court has only twice used the "acute * * * economic effects" phrase, *De Buono*, 520 U.S. at 816 n.16; *Travelers*, 514 U.S. at 668, and in each instance it was noting that even a law of general applicability that only indirectly impacts ERISA plans by increasing costs to the plan could be preempted if the law's effects were "so acute 'as to force an ERISA plan to adopt a certain scheme of substantive coverage or effectively restrict its choice of insurers." *De Buono*, 520 U.S. at 816 n.16 (quoting *Travelers*, 514 U.S. at 668). The Court did not suggest that an "acute" effect is a prerequisite to preemption where, as here, a law's effect on carriers is more direct.

delayed while a driver waits to see if the addressee is able to sign in person. J.A. 58.

The identified impacts of Section 1555-C(3)(C) on the timeliness of delivery and manner of receipt constitute a "significant effect," *Morales*, 504 U.S. at 388, that relates to "a central matter of" a carrier's services, *Egelhoff*, 532 U.S. at 148. Indeed, federal law lists "receipt," "delivery," and "handling" among the "services" included within the definition of "transportation" for purposes of the Department of Transportation's statutes. 49 U.S.C. 13102(23)(B). United Parcel Service (UPS), for example, "guarantees delivery at a time and date certain after a package has been picked up, and if a package is not timely delivered, UPS will * * * provide a full refund or credit of the shipping charges." J.A. 48.[3]

2. Although Section 1555-C(3)(C) is directed in the first instance at tobacco retailers, mandating that they "utilize a delivery service that imposes the [specified] requirements," preemption under the FAAA Act is not limited to statutes that "actually prescrib[e] rates, routes, or services." *Morales*, 504 U.S. at 385. Rather, a state law may be preempted as "related to" motor carrier prices, routes, or services even if the effect thereon is "only indirect." *Id.* at 386. Thus, as the court of appeals ruled, the Act may preempt laws that "limit

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[3] Although Section 1555-C(3)(C) uses the term "delivery service," that does not result in preemption under the "reference to" test because it applies to some delivery services that are not covered by the FAAA Act. See *Dillingham*, 519 U.S. at 325. The Tobacco Delivery Law defines "delivery service" as "a person, including the United States Postal Service, who is engaged in the commercial delivery of letters, packages or other containers." 22 Me. Stat. § 1551(1-C). That definition encompasses transportation services not covered by the FAAA Act, such as local couriers using small vans or bicycles. See Pub. L. No. 109-59, Tit. IV, §§ 4142(a), 4202(b), 119 Stat. 1747, 1751 (49 U.S.C. 13102(12) and (14) (Supp. V 2005)); 49 U.S.C. 31132(1)(A) and (B).

While the fact that the Tobacco Delivery Law can, in theory, apply without reference to motor carrier services means that it is not preempted under the *per se* rule, that does not mean that it is saved from preemption under the "connection with" test. *Morales* rejected the notion that "only state laws specifically addressed to the airline industry are preempted." 504 U.S. at 386.

retailers to hiring only those carriers that comply with the state-imposed mandates." Pet. App. 24.

Moreover, it is not at all clear that the Tobacco Delivery Law does not directly regulate carriers in addition to retailers. Section 1555-C(3)(D) requires the retailer to provide "delivery instructions" that inform the delivery service of the subsection's requirements and that "state law requires compliance with the requirements." 22 Me. Stat. § 1555-C(3)(D). Thus, it appears that Maine "requires compliance" by the delivery service itself with the statute's requirements regarding addressee signature and age verification. The broad language of Section 1555-C(3)(E), which subjects to penalty "[a] person who violates this subsection," also suggests that the subsection applies to persons other than retailers.[4]

Tellingly, the brief of the *amici* States supporting petitioner characterize the Tobacco Delivery Law as "*requiring carriers to comply* with simple delivery and age-verification requirements when a package is labeled as 'tobacco.'" Cal. Br. 1 (emphasis added). Those States contend that direct regulation of the carriers' delivery methods is "the most effective method" because unscrupulous on-line retailers "do not enforce age restrictions." *Ibid.* While it may be true that regulating a relatively few, law-abiding carriers is more effective than pursuing the wrongdoers themselves, that is no basis for disregarding the FAAA Act's preemption provisions. Indeed, the perceived efficiencies of regulating carriers rather than

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[4] The placement of the knowledge-imputation provision in the second sentence of Section 1555-D suggests that it is of relevance to the prohibition set forth in the first sentence of that Section, which refers only to the State's tobacco *licensing* requirements, not the provisions that prohibit furnishing tobacco to minors. The State contends, however, that the imputed-knowledge provision "furthers public health objectives, and has nothing to do with the economic regulation of carriers." Pet. Br. 47. That suggests that the imputed-knowledge provision is intended to facilitate enforcement against delivery services of the provisions in Section 1555-C(3)(C). If so, that is further evidence that the requirements of Section 1555-C(3)(C) are made directly applicable to delivery services by Section 1555-C(3)(D).

certain classes of difficult-to-regulate shippers may be precisely why Congress deemed the preemption provision necessary to protect Congress's chosen policy of deregulation.

But, even if the addressee-signature requirements cannot be enforced directly against the carrier, a State cannot avoid the preemptive effect of the FAAA Act simply by directing retailers "to hir[e] only those carriers that comply with the state-imposed mandates. Either way, the state is employing its coercive power to police the method by which carriers provide services in the state." Pet. App. 24. The States could not, for example, avoid the holding in *Morales* by prohibiting airline ticket purchasers from buying tickets from airlines that failed to follow the Attorney Generals' guidelines regarding marketing. See, *e.g.*, *Engine Mfrs. Ass'n* v. *South Coast Air Quality Mgmt. Dist.*, 541 U.S. 246, 255 (2004).

3. That is not to say that the FAAA Act would preempt a state law requiring shippers to utilize a particular service that is already widely offered by carriers, such as UPS's "Delivery Confirmation Adult Signature Required" (DCASR) service. See J.A. 51-53. Where such a service is widely available, a state law requiring retailers to utilize that already commercially available service in a particular class of sales—and that did so, not as a "guise" to regulate motor carrier services as such (see H. Rep. 677, at 84), but in an effort to further health, safety, or similar purposes independent of the transportation industry—would not have a "forbidden significant effect" on carrier services. *Morales*, 504 U.S. at 388; cf. *Wolens*, 513 U.S. at 228-230, 233 (ADA does not preempt state-law breach-of-contract action to enforce agreement the airline voluntarily undertook). The fact that carriers had made an independent commercial decision to offer the particular service would show that, as Congress intended, the carriers' "[s]ervice options [were] dictated by the marketplace[,] and not by an artificial regulatory structure." H. Rep. 677, at

88.[5] Moreover, such a law would not frustrate Congress's goal of allowing "national and regional carriers" to develop "a standard way of doing business" without navigating a "patchwork of regulation" at the State level. *Id.* at 87.[6]

The particular service that Maine has prescribed by statute differs in significant respects from the adult-signature-required services that are available in the marketplace. See Pet. App. 22-23, 64-65. As noted, the requirement that the package be signed for by *the addressee* has dramatically different effects on how a carrier conducts its business. See *id.* at 22-23; J.A. 53-59. Indeed, faced with the choice of develop-

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[5] While such a state law might have some effect on the relative volumes of different carrier services, it would require no modification in carrier services or package-delivery procedures. And, while the increase in market demand for such a service might "alter[] the incentives" of carriers that had not competed for that segment of the market before, the state law would "not dictate the choices" of those carriers, *Dillingham*, 519 U.S. at 334; the market would.

[6] At least one federal law makes reference to an adult-signature-required service. In response to greater restrictions on air travel, Congress passed a law specifically allowing interstate shipment of wine if, among other things, the container "is marked to require an adult's signature upon delivery." 27 U.S.C. 124(a)(3) (Supp. V 2005). This Court likewise referred to such a service in *Granholm* v. *Heald*, 544 U.S. 460 (2005). There, the Court struck down state statutes that prevented out-of-state wineries from shipping directly to consumers. The Court noted that there were other steps States could take to prevent minors from obtaining wine by mail: "For example, the Model Direct Shipping Bill developed by the National Conference of State Legislatures requires an adult signature on delivery and a label so instructing on each package." *Id.* at 491. Section 3(c) of that model bill states: "All Wine Direct Shipper Licensees shall * * * [e]nsure that all containers of wine shipped directly to a resident in this state are conspicuously labeled with the words 'CONTAINS ALCOHOL: SIGNATURE OF PERSON AGE 21 OR OLDER REQUIRED FOR DELIVERY.'" *Model Direct Wine Shipment Bill* (visited Oct. 10, 2007) <http://www.wineinstitute.org/programs/shipwine/Model_Direct_Shipping_Bill.pdf>. Unlike Section 1555-C(3)(C), neither the federal statute nor the model bill requires that the *addressee* sign for the package.

ing a service that complied with the Maine statute and ceasing delivery of tobacco products, UPS chose the latter. J.A. 61.[7]

Petitioner argues (Br. 45) that the effect of Maine's statute should be measured by the difference in cost between providing a Section 1555-C(3)(C)-compliant service and the adult-signature service that is already commercially available. But that argument miscomprehends the nature of Congress's interest in preempting state laws relating to carrier services. It is not the fact (if true) that Maine's tobacco-specific delivery procedures could be complied with for an additional 25 cents, and New York's for 20 cents, and California's for 35 cents. Rather, it is the fact that each State's tobacco-delivery requirements could be different. And, if petitioner were correct, each State could impose a different set of requirements for each of any number of commodities that the State decides to regulate in the interest of public health and safety. Thus, rather than a handful of different services that a carrier provides to all shippers across the nation, carriers would have to provide multiple item-specific services for each of the fifty States. A bill of lading that sought to list all of the distinct services might run many pages. The "'tailoring of [services] to the peculiarities of the law of each jurisdiction' is exactly the burden [the preemption provision] seeks to eliminate." *Egelhoff*, 532 U.S. at 151. And even a relatively unburdensome patchwork of differing state regulations is a far cry from the national deregulatory policy favored by Congress and implemented through the preemption provision.

B. Section 1555-D

1. The first sentence of Section 1555-D provides that a "person" may not "knowingly transport" or cause to be delivered to a person in Maine a tobacco product purchased from

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[7] Federal Express and DHL also appear to offer services like DCASR, but not like the one envisioned by Maine. See http://www.fedex.com/us/services/options/signatureoptions.html; http://www.dhl-usa.com/USSvcs/ValueAddSrvc.asp?nav+USServices/DDeliveryServices/SpecialServices.

a person who is not licensed as a tobacco retailer in the State, unless the delivery is to a licensed tobacco distributor or retailer. Thus, it is a violation of that provision to transport tobacco products from an unlicensed retailer to an individual purchaser, irrespective of his or her age. The court of appeals held that that prohibition is not preempted by the FAAA Act. It reasoned that tobacco products purchased by a consumer from an unlicensed retailer are contraband, Pet. App. 25 (citing 22 Me. Stat. § 1555-C(7)), and, like the laws prohibiting prostitution and gambling referred to in *Morales*, laws barring transportation or delivery of contraband (including, *e.g.*, illegal drugs) regulate primary conduct and have only a "tenuous, remote, or peripheral" relation to carrier services. Pet. App. 25-26 (quoting *Morales*, 504 U.S. at 390). As the court of appeals noted, the first sentence of Section 1555-D requires that carriers and other persons in the State not act as knowing accomplices in the illegal sale of tobacco products. "It does not, however, require that carriers modify their delivery methods other than by declining to transport a product that Maine has legitimately banned." *Id.* at 26. Respondents have not challenged that holding.

2. The second sentence of Section 1555-D, however, goes further, and the court of appeals correctly found it preempted. That provision imputes to a person knowledge that a package contains tobacco products "if the package is marked in accordance with the requirements of [Section 1555-C(3)(B)]," or if the seller is "listed as an unlicensed tobacco retailer" on a list maintained by the Maine Attorney General. 22 Me. Stat. § 1555-D. The Attorney General must provide to "delivery service[s]" separate "lists of licensed tobacco retailers and known unlicensed tobacco retailers." *Id.* § 1555-D(1).

In order to avoid imputed knowledge of package contents, carriers are, in effect, forced to change package-processing procedures that are otherwise uniform across the nation. For "*every* package destined for delivery in Maine," the carrier "must specially inspect" the package to determine whether it

"is marked as containing tobacco or if the seller's name appears on the Attorney General's list" of unlicensed retailers. Pet. App. 27 (emphasis added). If any packages are so marked, or the shipper is on the list of unlicensed tobacco retailers, the carrier "must segregate the packages * * * and research whether the *addressee* is a Maine-licensed retailer or distributor who can [lawfully] receive the package." *Id.* at 27-28 (emphasis added). A carrier is obliged to ascertain certain information about both the shipper and the recipient of the package—information for which the carrier would ordinarily have no need for purposes of providing delivery service. As the court of appeals correctly concluded, the "imputation" mandated by Section 1555-D therefore "amount[s] to prescribing how carriers must operate." *Id.* at 28.

Moreover, unlike the first sentence of Section 1555-D, which applies generally to any person who "knowingly transport[s]" tobacco from an unlicensed retailer (other than to a licensed distributor or retailer), the second sentence of Section 1555-D appears to apply only to delivery services, because it imputes knowledge based on the way a package is marked under the "delivery service" provisions in Section 1555-C(3)(B) or on information contained in confidential lists that the Attorney General provides only to delivery services. See 22 Me. Stat. § 1555-D. Even though, as noted above, see note 3, *supra*, the phrase "delivery service" is broader than "motor carriers" and thus the statute is not preempted under the *per se* "reference to" test, it is certainly relevant to the determination whether a law operates "in connection with" a carrier's service that it directly regulates a class that is only slightly broader than the class protected by federal law.

3. Petitioner argues that, even if carriers are required to modify their package handling procedures in response to Section 1555-D, the effect is "*de minimis*" because those steps would be "similar to what UPS appears to be doing to comply with its settlement with New York," in which UPS (as well as Federal Express and DHL) agreed not to ship cigarettes to

individual customers in the United States at all, and not to accept shipments of tobacco products unless the recipient is licensed by applicable law. See Pet. Br. 15-16, 49. But a consent decree is not a unilaterally imposed state law. Agreeing not to ship cigarettes knowingly to unlicensed recipients, *id.* at 15, is similar to the rule of general applicability in the first sentence of Section 1555-D, which the court of appeals upheld. That is quite different from being forced, under threat that knowledge will be imputed to the carrier by operation of law, to undertake *affirmative* steps to identify packages from *un*licenced shippers who are attempting to evade detection (a requirement that would entail review of *every* package destined for delivery in Maine).

Petitioner contends that the imputed-knowledge provision of Section 1555-D "simply identifies [the] evidence" on which the State would rely in enforcing its restrictions on the delivery of tobacco products. Pet. Br. 46. But as we have shown, the provision does much more; it effectively requires carriers to alter their package processing and distribution procedures. In addition, imputing knowledge on the basis of certain factors establishes an irrebuttable presumption of knowledge in the specified circumstances. Such a presumption is a substantive rule of liability, not merely a rule of evidence. See *Michael H.* v. *Gerald D.*, 491 U.S. 110, 119-121 (1989). Thus, the State has legislated a standard of conduct to which carriers must conform in order to avoid liability: for every package to be delivered in Maine, motor carriers must scrutinize the package for a "Tobacco Products" label and cross-check the shipper against the Attorney General's lists. Indeed, because an individual delivery person is subject to penalty under Section 1555-D(2)(A), independent of the employer's liability under Section 1555-D(2)(B), it would seem that each delivery

person must personally inspect each package and cross-check the shipper against the list, or risk individual liability.[8]

Finally, petitioner's suggestion that the Tobacco Delivery Law cannot be enforced effectively without the imputed-knowledge provision is unpersuasive. Petitioner has identified numerous other provisions of State law that restrict contraband, see, *e.g.*, 28-A Me. Stat. § 2081(1)(A) (prohibiting "knowingly" delivering liquor to a minor), yet none contains an imputed-knowledge provision like that in Section 1555-D. There is no reason to believe that the State's enforcement efforts respecting tobacco will be any less effective in the absence of Section 1555-D's imputed-knowledge provision.

III. THE PUBLIC HEALTH PURPOSES UNDERLYING MAINE'S TOBACCO DELIVERY LAW DO NOT SAVE IT FROM PREEMPTION UNDER THE FAAA ACT

Petitioner contends (Br. 32) that the FAAA Act's objective was limited to preempting "economic laws" and that the Tobacco Delivery Law should be upheld as falling instead into a category of non-preempted "public health laws." Petitioner is incorrect on both counts. The FAAA Act's omission of any "economic" limitation, and its inclusion of carrier "services" among the areas protected by the statute, demonstrate that Congress's concern was broader than "economic laws." In any event, Maine's law dictating the manner of delivery and form of receipt required for certain delivery sales constitute "economic" regulation. Petitioner's argument for an exception for state laws motivated by non-economic police-power concerns would introduce in unadministrable and atextual element to the preemption inquiry, and is inconsistent with

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[8] Petitioner relies (Br. 9) on a Maine regulation under which a carrier is deemed not to know of a package's tobacco contents if it was marked only on the side opposite the address. See Pet. App. 56 n. 67 (discussing 10-144 Code Me. R. Ch. 203, § 11 (2005)). That provision does not, however, relieve the carrier of the practical need to search each of the other five sides of every package to ensure that knowledge of any tobacco contents will not be imputed to it pursuant to Sections 1555-D and 1555-C(3)(B). See Resp. C.A. App. 11, 98.

the FAAA Act's sweeping preemptive language, its carve-out of specified areas of state regulation that remain subject to federal supervision, and the legislative history's endorsement of the "broad preemption interpretation" of the related ADA provision in *Morales*. See H. Rep. 677, at 83.

A. Petitioner's effort to limit FAAA Act preemption to "states' economic regulation of motor carriers," Pet. Br. 31, seeks to supplant the statute's broad text with more limited language that Congress considered and rejected. As the Court observed in *Morales*, 504 U.S. at 385 n.2, when Congress considered the ADA, the Senate bill provided that "[n]o State shall enact any law, establish any standard *determining* routes, schedules, or rates, fares, or charges in tariffs of, *or otherwise promulgate economic regulations* for, any air carrier." S. Rep. No. 631, 95th Cong., 2d Sess. 171 (1978) (emphasis added). In place of that language, the conferees adopted the House's version, H.R. Conf. Rep. 1779, 95th Cong., 2d Sess. 94-95 (1978) (Conf. Rep. 1779), which preempted States from "enact[ing] or enforc[ing] *any* law, rule, regulation, standard or other provision having the force and effect of law *relating to* rates, routes, or *services* of any air carrier." ADA § 4(a), 92 Stat. 1708 (emphasis added).

The two ADA bills differed in at least three respects, each of which undermines petitioner's argument. First, Congress rejected the Senate's limited focus on state laws "determining" routes and rates in favor of the broader "relating to" language. See *Morales*, 504 U.S. at 385 n. 2. In addition, the House version preempted laws relating to carrier "services," while omitting the Senate's limiting, but hardly self-defining, descriptor "economic." Conf. Rep. 1779, at 4, 94-95. The latter two differences are related. Many carrier "services" are not "economic," at least in the narrow sense used by petitioner. Indeed, the breadth of the term "services" is reflected in the definition of "transportation," which encompasses "services" related to the movement of property, "including receipt, delivery, * * * [and] handling" of property. 49 U.S.C.

10102(28)(b) (1994). Plainly, petitioner cannot dispute that Maine's Tobacco Delivery Law "relates to * * * services" such as "receipt," "delivery" or "handling," of property. Equally clearly, the courts are not free to read into the statute an "economic" limitation if the effect would be to read out of the statute many of the kinds of "services" that are expressly included and protected under the plain text. Cf. *Morales*, 504 U.S. at 385 (rejecting argument that ADA "only pre-empts the States from actually *prescribing* rates, routes, or services" because it "simply reads the words 'relating to' out of the statute" (emphasis added)).

Neither do references in the FAAA Act's legislative history to "[s]tate economic regulation of motor carrier operations" as the Conferees' principal focus, H. Rep. 677, at 87, advance petitioner's argument. The legislative history makes clear, if the text's reference to "services" did not, that Congress was concerned about state regulations related to delivery. See, *e.g.*, *Legislation to Preempt State Motor Carrier Regulations Pertaining to Rates, Routes, and Services: Hearing Before the House Subcomm. on Surface Transp. of the House Comm. on Public Works and Transp.*, 103d Cong., 2d Sess. 123 (1994) (noting, among "services" offered, "next-day air, three-day select," and a paperless information system that allowed shippers to "get information on their delivery within minutes of delivery"). Petitioner also cites (Br. 29-30) the Ninth Circuit's pre-FAAA Act decision in *Federal Express* as allowing States "to act in an area of non-economic regulation." 936 F.2d at 1078. Significantly, however, the Ninth Circuit made that statement with respect to "general traffic laws" and "safety requirements for trucks on its highways." *Ibid.* Of more relevance here, the court recognized that a carrier's "terms of service" included such matters as "rules on claims," "bills of lading" and "freight bills," and that, while "not patently economic," those subjects were "as much protected from state intrusion as are the air carrier's rates." *Ibid.*

B. Petitioner's argument (Br. 24-25, 32-35) for a broad, nontextual exception to preemption for any state regulation related to "public health," *id.* at 32, would upset the statutory scheme by permitting States to adopt an inconsistent patchwork of regulations related to delivery services, as long as those regulations were motivated by health and safety concerns. But health-motivated regulation is no less likely than regulation motivated by other concerns to frustrate the policy to permit "national and regional carriers" to "conduct a standard way of doing business" that is "dictated by the marketplace[,] and not by an artificial regulatory structure." H. Rep. 677, at 87-88. Here, while Section 1555-C(3) may be motivated by the State's public health concern to curb youth smoking, it has chosen the regulation of carriers' delivery services to further that goal. The underlying purpose no more saves the Tobacco Delivery Law from preemption than would a similar purpose that motivated a State to mandate an increase in carriers' rates for tobacco deliveries, though such a law might also deter youth purchases.

The FAAA Act's explicit delineation of specific exceptions also precludes the general police powers exception envisioned by petitioner. Congress clearly considered traditional areas in which the States might exercise regulatory authority over carriers and specified which of those areas were not subject to preemption (motor vehicle safety, route controls for specified purposes, insurance requirements, and the transportation of household goods). 49 U.S.C. 14501(c)(2), 41713(b)(4)(B); see H. Rep. 677, at 84, 85. Petitioner does not contend that the Tobacco Delivery Law fits within any of those exceptions. When Congress creates exceptions in a statute, courts have no authority to create others; rather, "[t]he proper inference * * * is that Congress considered the issue of exceptions and, in the end, limited the statute to the ones set forth." *United States* v. *Johnson*, 529 U.S. 53, 58 (2000). Moreover, the matters excluded are addressed in specific and readily-administrable terms. While Congress surely could have further ex-

empted a broad class of health-motivated or non-economic regulations, such a Congress presumably would have offered courts some more concrete guidance in delimiting the pre-emption scope. Petitioner's proposed atextual exception, by contrast, asks courts to embark on a vague purpose-bound inquiry without any textual guidance.

Relying on the caption given to the exceptions and a statement in the legislative history, petitioner contends that the list of "[m]atters not covered" by the preemption provisions was "not intended to be all inclusive, but merely to specify some of the matters which are not 'prices, rates or services' and which are therefore not preempted." Pet. Br. 35 (quoting H. Rep. 677, at 84). But that statement in the Conference Report cannot be credited. It makes no sense to say, for example, that a law "impos[ing] highway route controls," 49 U.S.C. 14501(c)(2)(A), is not "related to a * * * route," or that a law "relating to the price of * * * motor vehicle transportation by a tow truck," 49 U.S.C. 14501(c)(2)(C), is not "related to a price," and would come within the general rule of preemption but for the respective exceptions. Moreover, treating the specified categories as merely examples of a general rule excluding all noneconomic regulation cannot be squared with the statutory text, which states that "*[e]xcept as provided in*" specified provisions, state regulations "related to a price, route, or service" of a carrier are preempted. 49 U.S.C. 14501(c)(1), 41713(b)(4)(A) (emphasis added).

Moreover, the areas in which Congress specified that States may undertake regulation for safety and related purposes are ones in which other Acts of Congress explicitly or impliedly allow for state regulation, but also generally imposed limits on the States' authority. See p. 2 & note 1, *supra*. Petitioner urges the Court to engraft a broader, nontextual exception for all state regulations that are motivated by health or safety concerns, but with no corresponding authority on the part of the Secretary of Transportation to pre-

empt such laws. That would dramatically alter the state-federal balance that Congress established.[9]

C. Petitioner erroneously suggests (Br. 25) that the Tobacco Delivery Law is saved because it shares a "common purpose[]" with federal law. *Ibid.* (quoting *PhRMA* v. *Walsh*, 538 U.S. 644, 666 (2003)). Petitioner relies (Br. 3-4, 24-25, 37-39) on the "Synar Amendment" to the ADAMHA Reorganization Act, Pub. L. No. 102-321, § 202, 106 Stat. 394, which provides that the Secretary of Health and Human Services (HHS) "may" award a grant to any State that "has in effect a law providing that it is unlawful for any manufacturer, retailer, or distributor of tobacco products to sell or distribute any such product to any individual under the age of 18." 42 U.S.C. 300x-26(a)(1); see *Lorillard Tobacco Co.* v. *Reilly*, 533 U.S. 525, 552 (2001). Nothing in the Synar Amendment authorizes States to enact laws otherwise preempted by the FAAA Act in furtherance of that goal. The Amendment does not mandate any state laws related to the *transportation* of tobacco products.[10] Rather, HHS's regulation implementing the Synar Amendment focuses on restricting over-the-counter and vending machine sales. See 45 C.F.R. 96.130.[11] The court

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[9] Petitioner's reliance (Br. 31-32) on *City of Columbus* v. *Ours Garage & Wrecker Service, Inc.*, 536 U.S. 424 (2002), is misplaced. That case concerned whether the authority expressly preserved to States in 49 U.S.C. 14501(c)(2)(A) could be delegated to municipalities. 536 U.S. at 428, 440. Nothing in *Ours Garage* suggests that the FAAA Act also contains an unwritten broad exemption for *all* state safety regulation.

[10] Contrary to petitioner's suggestion (Br. 38-39), the Synar Amendment's phrase "distributor of tobacco products" refers to a wholesaler, not a carrier transporting packages. That is also how Maine's Tobacco Delivery Law uses the term. See, *e.g.*, 22 Me. Stat. § 1555-D (distinguishing between "delivery service" and "distributor," the latter of which must be licensed).

[11] As petitioner notes (Br. 40 n.45), HHS has allowed the States "flexibility to determine which strategies are most appropriate for meeting the compliance target and enforcement requirements" of the Synar Amendment. 61 Fed. Reg. 1495 (1996). That statement affords flexibility to pursue lawful options; it does not override the FAAA Act's specific preemption provisions.

of appeals correctly concluded that the FAAA Act and Synar Amendment "can exist harmoniously because the states may pass laws to curb underage smoking without passing laws 'related to' carrier prices, routes, or services." Pet. App. 21 n.12.

Moreover, the court of appeals' decision leaves in place another provision, which respondents did not even challenge, that prohibits all persons (including carriers) from providing tobacco products to minors. See 22 Me. Stat. § 1555-B(2) (Supp. 2006) ("A person may not sell, furnish, give away or offer to sell, furnish or give away a tobacco product to any person under 18 years of age"); *id.* § 1551(2-A) (defining "[p]erson" as "an individual, corporation, partnership or unincorporated association"). Alternatively, Maine could ban outright all non-face-to-face sales of tobacco. Cal. Br. 13; see, *e.g.*, Md. Code Ann. Bus. Reg. § 16-222 (2004); *id.* § 16-223 (Supp. 2006); Ark. Code Ann. §§ 26-57-203 (LexisNexis Supp. 2005); *id.* § 26-57-215 (Michie 1997). See *Arkansas Tobacco Control Bd.* v. *Santa Fe Natural Tobacco Co.*, 199 S.W.3d 656 (Ark. 2004) (upholding, against Commerce Clause challenge, ban on non-face-to-face retail sales of cigarettes); *Brown & Williamson Tobacco Corp.* v. *Pataki*, 320 F.3d 200 (2d Cir. 2003) (same). Such laws of general applicability, which do not dictate methods of delivery, do not have a "forbidden significant effect" on carrier services. See pp. 19- 20, *supra*.

D. Petitioner also argues (Br. 23-24, 34, 37) that Sections 1555-C(3)(C) and the second sentence of Section 1555-D should be upheld by analogy to statutes that prohibit the transportation of contraband. The court of appeals did uphold the first sentence of Section 1555-D by analogy to prohibitions on transporting contraband. See Pet. App. 25-26. But that rule cannot be extended to the other challenged provisions of the Tobacco Delivery Law. Those provisions define tobacco to be contraband not by reference to licensing laws, but by whether its is delivered consistent with Maine's delivery requirements. See 22 Me. Stat. 1555-C(7) ("[a]ny tobacco product sold * * * in a delivery sale that does not meet the re-

quirements of this section is deemed to be contraband"); *id.* § 1555-D(6) (same). Petitioner cannot bootstrap rules that impermissibly relate to carrier services by the simple *ipse dixit* of declaring sales in contravention of the delivery rules to be contraband.[12]

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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[12] Petitioner and his State *amici* identify a number of statutes that ban or regulate the transportation of various items, including tobacco, alcohol, animals, and hazardous materials. Pet. Br. 23-24 nn.36 & 37; Cal. Br. 12-13, 16, 18-19. Those statutes would, of course, have to be reviewed on their own terms. Some prohibit "knowing[]" delivery of alcohol or tobacco to a minor or transportation of unlicensed contraband, but do not prescribe particular delivery procedures, and would not be preempted for the same reasons that similar prohibitions in 22 Me. Stat. § 1555-B(2) and the first sentence of Section 1555-D are not. Other cited statutes require shippers to utilize an adult-signature-required delivery service like those commercially available and would not be preempted. See pp. 17-18 & note 6, *supra*. Yet others would have to be analyzed to determine whether a more specific federal statutory scheme that focuses directly on the safety of the product being transported expressly contemplates a role for state transportation regulations, as some do. See, *e.g.*, Pub. L. No. 109-59, § 7202, 119 Stat. 1911, 1912 (21 U.S.C. 350e(b) and (e) (Supp. V 2005)) (directing Secretary of HHS to issue regulations prescribing sanitary transportation practices for food and preempting state laws that conflict with such regulations); 49 U.S.C. 5125(b)(2) (authorizing States to adopt regulations regarding the transportation of hazardous materials that are "substantively the same as" regulations adopted by the Department of Transportation); see also *Procedures Governing the Cooperative State-Public Health Service/Food and Drug Administration Program of the National Conference on Interstate Milk Shipments* <http://www.cfsan.fda.gov/~ear/imsproc.html#memor> (establishing joint federal-state cooperative program under 42 U.S.C. 243(b) for regulation of milk safety, including transportation). Other state regulations may merely duplicate applicable federal standards, as 7 Me. Stat. § 3981 does 49 U.S.C. 80502 (standards for the humane transport of animals). Finally, some of the statutes may well suffer from the same or similar defects as Maine's and would be preempted, for the reasons set forth above.

PAUL D. CLEMENT
Solicitor General

D.J. GIBBIN
General Counsel

PETER D. KEISLER
Assistant Attorney General

PAUL M. GEIER
Assistant General Counsel for Litigation

EDWIN S. KNEEDLER
Deputy Solicitor General

DALE C. ANDREWS
Deputy Assistant General Counsel for Litigation

DOUGLAS HALLWARD-DRIEMEIER
Assistant to the Solicitor General

PAUL SAMUEL SMITH
Senior Trial Attorney
Department of Transportation

MARK B. STERN
CHRISTINE N. KOHL
Attorneys

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In the Supreme Court of the United States

G. STEVEN ROWE, ATTORNEY GENERAL OF MAINE,

Petitioner,

v.

NEW HAMPSHIRE MOTOR TRANSPORT ASSOCIATION, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF OF THE AMERICAN TRUCKING ASSOCIATIONS, INC. AND THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

ROBERT DIGGES, JR.
ATA Litigation Center
950 N. Glebe Road, Suite 210
Arlington, VA 22203-4181
(703) 838-1865

ROBIN S. CONRAD
AMAR D. SARWAL
National Chamber Litigation Center, Inc.
1615 H Street, NW
Washington, DC 20062
(202) 463-5337

EVAN M. TAGER
Counsel of Record
JACK L. WILSON
Mayer Brown LLP
1909 K Street, NW
Washington, DC 20006
(202) 263-3000

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BRIEF OF THE AMERICAN TRUCKING ASSOCIATIONS, INC. AND THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

INTEREST OF THE *AMICI CURIAE*[1]

The American Trucking Associations, Inc. ("ATA") is a trade association of motor carriers, state trucking associations, and national trucking conferences created to promote and protect the interests of the trucking industry. Directly and through its affiliated organizations, ATA represents over 30,000 companies and every type and class of motor carrier operation in the United States, including parcel delivery companies, companies whose operations are categorized as less-than-truckload ("LTL"), and companies that primarily haul truckload quantities of freight. ATA regularly advocates the trucking industry's common interests before this Court and other courts. ATA and its members have a strong interest in motor carrier regulations generally, and ATA has special familiarity with the issue of preemption under the Federal Aviation Administration Authorization Act ("FAAAA") raised in this case because it actively participated in the formulation of federal motor carrier deregulation policy in Congress. See H.R. CONF. REP. NO. 103-677, at 88 (1994), reprinted in 1994 U.S.C.C.A.N. at 1715, 1760.

The Chamber of Commerce of the United States of America ("the Chamber") is the world's largest business federation, representing a membership of more than three million businesses and organizations of every size. The Chamber's members, including its motor carrier members, operate

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[1] Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici* and its counsel made a monetary contribution to its preparation or submission. The parties' letters consenting to the filing of this brief have been filed with the Clerk's office.

in every industry sector of the economy, throughout the United States, and around the globe. The Chamber's members rely on parcel delivery companies and other motor carriers to deliver needed raw materials and components and to distribute their products on a timely, efficient, and cost-effective basis. A central function of the Chamber is to represent the interests of its members in important matters before this Court and other courts, Congress, and the Executive Branch. To that end, the Chamber has filed amicus briefs in numerous cases addressing issues of vital concern to the Nation's business community.

The national trucking industry is of massive size and scope and is an essential pillar of the American economy and lifestyle. The U.S. Department of Transportation's Federal Motor Carrier Safety Administration ("FMCSA") estimates that there are almost 685,000 motor carriers operating in interstate commerce.[2] In 2002, nearly eight billion tons of freight (over 2/3 of domestic tonnage shipped) with a value of over $6 trillion moved by truck.[3] To efficiently and competitively undertake the more than six million estimated daily shipments needed to move this volume of freight, trucking companies need to employ uniform procedures free of individualized state regulatory requirements that impede the free flow of trucking commerce. An overarching federal regulatory network accompanied by strong preemption allows the trucking industry to meet the needs of the American economy.

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[2] U.S. Dep't of Transp., FMCSA, FY2008 Budget Estimates at 4A-9, available at http://www.fmcsa.dot.gov/documents/about/FMCSA-FY-08-Budget-Est.pdf.

[3] U.S. Census Bureau, 2002 Economic Census, 2002 Commodity Flow Survey, tbl.1a (Dec. 2004), available at http://www.census.gov/prod/ec02/ec02tcf-us.pdf.

INTRODUCTION AND SUMMARY OF ARGUMENT

The FAAA broadly preempts any "law * * * related to a price, route, or service of any motor carrier" or any "air carrier * * * transporting property * * * by motor vehicle." 49 U.S.C. §§ 14501(c)(1) & 41713(b)(4)(A). These preemption provisions were enacted in 1994 with the goal of eliminating the "patchwork" of burdensome state trucking regulations that had developed and to ensure that States would not undo federal deregulation with regulation of their own. To achieve this goal, Congress incorporated the "broad" preemptive language and effect of the Airline Deregulation Act ("ADA"), 49 U.S.C. § 41713(b)(1), as interpreted by this Court in *Morales* v. *Trans World Airlines*, 504 U.S. 374 (1992). Accordingly, like the ADA, the FAAAA preempts all laws that expressly reference or significantly affect a price, route, or service of any motor carrier. FAAAA preemption is an essential component of the broader federal policy of uniform regulation of interstate motor carriers, as evidenced by the FAAAA's legislative history and the structure of federal motor carrier regulation as a whole. This policy permits carriers—such as UPS, Federal Express ("FedEx"), DHL, and others—to achieve an efficient and "standard way of doing business" nationwide.

Express carriers' "standard way of doing business"—and the timely, efficient, and cost-effective delivery of packages it enables—is essential not only to the carriers themselves but also to their customers who rely on them and to the economy as a whole. While the "express industry makes a significant direct contribution to the global economy," "[t]he most important role of the express industry is in facilitating the success of other parts of the global economy."[4] Moreover, while the express delivery industry is already "a major element of

[4] Oxford Economic Forecasting, *The Impact of the Express Industry on the Global Economy* at 3 (Mar. 2005), available at http://tinyurl.com/2dg7de.

the transportation infrastructure of the nation" and "essential [to] modern commerce," "current trends suggest that [it] will assume an even more significant role in the future."[5] Among these trends are the ever-increasing sales of online retailers who rely on carriers such as UPS, FedEx, and DHL to provide the timely delivery services their customers demand.[6] Finally, because these carriers not only deliver products to customers but also transport the components of many of the same products during the course of the manufacturing process,[7] any disruptions or price increases caused by a patchwork of state regulations will have a cumulative effect that

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[5] Edward K. Morlok et al., *The Parcel Service Industry in the U.S.: Its Size and Role in Commerce*, at i (Univ. of Penn. 2000), available at http://www.seas.upenn.edu/~morlok/morlokpage/parcel.html; see also, *e.g.*, *id.* at 20-31 (describing the importance of parcel service to the economy); Leslie S. Hough & Maciek Nowak, *The Package Express Industry: A Historical and Current Perspective*, in TRUCKING IN THE AGE OF INFORMATION 77, 77 (Dan Belman & Chelsea White III eds., 2005) ("The package express industry in the United States" "is a central and dynamic element of the world economy, playing a critical role in the rapid movement of freight within an increasingly globalized economy."); cf. Daniel Gross, *UPS v. FedEx; Which Company is Right About the Economy*, SLATE, July 28, 2006, at http://www.slate.com/id/2146636 ("UPS and FedEx both make excellent bellwethers for the stock market as well as the economy at large. They have their fingers on the pulse of trade and services. When the economy is humming, these firms process ever-larger quantities of parcels, envelopes, and boxes.").

[6] *E.g.*, Daniel Gross, *One Word: Logistics; The Unheralded Key to the New Economy*, SLATE, Jan. 20, 2006, at http://www.slate.com/id/2134513.

[7] *E.g.*, *The Impact of the Express Industry on the Global Economy*, *supra* note 4, at 23-25; Morlok et al., *supra* note 5, at 29-30.

ultimately will be borne by consumers and the economy as a whole.[8]

For these reasons, it is of great concern to the U.S. business community that the FAAAA be applied as it is written—as preempting any state law that "relate[s] to" rates, routes, and services, and ***not*** just state laws that directly regulate the same, as petitioner would have it. Anything less than the broad preemptive scope that Congress intended will be insufficient to keep this vital channel of interstate commerce clear and unobstructed.

Under *Morales* and a straightforward reading of the FAAAA's text, the Maine Tobacco Delivery Law is preempted because it both expressly references carriers' services and significantly affects rates, routes, and services by disrupting carriers' standard way of doing business. Petitioner's cramped theory of FAAAA preemption must be rejected because it would expose carriers to precisely the sort of patchwork of state regulations that the statute was intended to eliminate, as each State could adopt its own unique and varying requirements for the delivery of tobacco and anything else deemed "dangerous" or "unhealthy." See Pet.'s Br. at 2. Such inconsistent state regulations not only are preempted by the FAAAA but also are inconsistent with the structure and purposes of federal motor carrier regulation as a whole. See Part IV, *infra*.

Petitioner's arguments notwithstanding, there is no "presumption against preemption" of such burdensome state regulation of a pervasively interstate industry that has been the subject of extensive federal regulation almost from its inception. Nor does the Synar Amendment shield the Maine

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[8] Cf. FAAAA, Pub. L. No. 103-305, tit. VI, § 601(a)(1), 108 Stat. 1569, 1605 (1994) (finding that the then-existing patchwork of state regulations had imposed "an unreasonable cost on the American consumers" and an "unreasonable burden on interstate commerce" as a whole).

laws from FAAAA preemption. Without a doubt, States may prohibit tobacco sales to minors and punish retailers who violate the prohibition. What they may ***not*** do, however, is regulate carriers' services and distribution procedures on a varying, state-by-state basis in an effort to conscript them into the policing and enforcement of such laws.

ARGUMENT

I. The FAAAA Broadly Protects Carriers Against A Patchwork Of Burdensome State Regulations.

Beginning with the Motor Carrier Act of 1980, Pub. L. No. 96-296, 94 Stat. 793 , Congress has made a commitment to deregulate the motor carrier industry. At that time, Congress found that "[t]he existing regulatory structure ha[d] tended in certain circumstances to inhibit innovation and growth and ha[d] failed, in some cases, to sufficiently encourage operating efficiencies and competition." H.R. REP. NO. 96-1069, at 10 (1980), reprinted in 1980 U.S.C.C.A.N. 2283, 2292; see also, *e.g.*, Michael J. Norton, Note, *The Interstate Commerce Commission and the Motor Carrier Industry—Examining the Trend Toward Deregulation*, 1975 UTAH L. REV. 709, 709 (reporting that federal motor carrier "regulation has recently come under attack for causing inefficiencies and wastefulness, and for repressing technological advances in the industry"). Thus, in order to remove obstacles to innovation and to encourage efficiency, Congress significantly deregulated the industry at the federal level.

It soon became clear, however, that federal deregulation could not achieve its objectives as long as burdensome and inconsistent state regulation persisted. In 1994, Congress found that "the regulation of intrastate transportation of property by the States" continued to "impose[] an unreasonable burden on interstate commerce;" "impede[] the free flow of trade, traffic, and transportation of interstate commerce;" and "place[] an unreasonable cost on the American consumers." FAAAA, Pub. L. No. 103-305, tit. VI, § 601(a)(1), 108 Stat.

1569, 1605 (1994). Specifically, Congress found that state regulation "causes significant inefficiencies," "increase[s] costs," and "inhibit[s] * * * innovation and technology." H.R. CONF. REP. NO. 103-677, *supra*, at 87. Indeed, despite deregulatory efforts at the federal level, "[t]he sheer diversity of [state] regulatory schemes [remained] a huge problem for national and regional carriers attempting to conduct a standard way of doing business." *Ibid.* Therefore, in order to free carriers from this burdensome "patchwork" of state regulation, Congress concluded that "preemption legislation [was] in the public interest as well as necessary to facilitate interstate commerce." *Ibid.*

To achieve its deregulatory goals, Congress purposefully copied the preemptive language of the ADA (*id.* at 83): Like the ADA, the FAAAA preempts any "law * * * related to ***a*** price, route, or service of ***any*** * * * carrier." 49 U.S.C. § 14501(c)(1) (emphasis added); see also *id.* § 41713(b)(4)(A). But see Pet.'s Br. at 18 (asserting that "[t]he preemptive language" Congress selected is, "of course, * * * relatively meaningless"). Further, Congress specifically intended to incorporate "the broad preemption interpretation adopted by [this] Court in *Morales*." H.R. CONF. REP. NO. 103-677, *supra*, at 83; see also *Morales*, 504 U.S. at 383 (these "words * * * express a broad pre-emptive purpose"). Under *Morales*, any state law that expressly references or significantly affects a price, route, or service of any carrier is preempted. 504 U.S. at 388.

II. The FAAAA Preempts *All* Laws That "Relate[] To" Carriers' Prices, Routes, Or Services.

Contrary to petitioner's arguments, the FAAAA preempts ***all*** laws that "relate[] to a price, route, or service of any * * * carrier," 49 U.S.C. § 14501(c)(1), not just "economic regulations." Petitioner's attempt to separate "economic regulations" from laws governing the delivery of "dangerous" substances or "public health delivery laws" has no basis in the statute itself and would ultimately prove un-

workable. *See* Part III, *infra*. The distinction also misreads one important pre-FAAAA precedent and essentially repackages an argument this Court rejected in *Morales*.

Petitioner cites approvingly the Department of Transportation's testimony that the FAAAA's preemption provision "would codify [*Federal Express Corp.* v. *California Public Utilities Commission*, 936 F.2d 1075 (9th Cir. 1991)], with one major difference"—*i.e.*, it would extend the benefits of federal preemption "to a much broader class of carriers." Pet. Br. at 30 (quoting *State Motor Carrier Laws: Hearing on S. 1491 Before the Subcomm. on Surface Transp. of the H. Comm. on Pub. Works & Transp.*, 103d Cong. (July 20, 1994) (testimony of Frank E. Kruesi, Assistant Secretary, U.S. Department of Transportation), available at 1994 WL 377958). While the Ninth Circuit did refer to "economic" and "non-economic" regulations in the *FedEx* case, it did ***not*** do so in the same sense that petitioner now uses those terms. Rather, the Ninth Circuit reasoned:

> Most of the regulations challenged here are obviously economic—they bear on price. Those regulations which are not patently economic—the rules on claims and bills of lading, for example—relate to the terms on which the air carrier offers its services. Terms of service determine cost. To regulate them is to affect the price. The terms of service are as much protected from state intrusion as are the air carrier's rates.

936 F.2d at 1078.

Thus, the Ninth Circuit recognized that even regulations that were "not patently economic" were still subject to preemption under the statute. And, as a matter of simple logic, if regulations "relate to terms of service," and "[t]erms of service determine cost," then the regulations ultimately "affect the price." This logic plainly supports respondents in this case: The Maine Tobacco Delivery Law's terms of delivery

and package processing requirements could easily be substituted for "bills of lading" in the Ninth Circuit opinion and the outcome would be the same.

Moreover, petitioner's "economic regulation" limitation is reminiscent of one of the arguments this Court rejected in *Morales*. There, the attorneys general argued that the ADA precluded States only from "actually prescribing rates, routes, or services." 504 U.S. at 385. As the Court recognized, this argument would nullify the broad preemptive language used in the ADA (and later in the FAAAA) by "simply read[ing] the words 'relating to' out of the statute." *Ibid.* "Had the statute been designed to pre-empt state law in such a limited fashion, it would have forbidden the States to 'regulate rates, routes, and services.'" *Ibid.* Just as in *Morales* there was no valid basis for replacing the broad "relating to" with the more narrow "regulate," in this case petitioner identifies no valid basis for replacing any "law"[9] with the amorphous category of "economic regulations."

III. The Maine Tobacco Delivery Law Expressly References Carriers' Services And Significantly Interferes With Carriers' Processing And Delivery Services.

The Maine Tobacco Delivery Law is preempted under the FAAAA because it both expressly references carriers' services and significantly affects their processing and delivery capabilities—and, by extension, their prices. To begin with, the express purpose of the statute—"***An Act To Regulate the Delivery*** and Sales of Tobacco Products and To Prevent the Sale of Tobacco Products to Minors"[10]—is to regulate and impose requirements on carriers' deliveries. And it

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[9] The FAAAA preemption provisions actually use the purposefully broad phrase: "law, regulation, or other provision having the force and effect of law related to a price, route, or service of any * * * carrier." 49 U.S.C. § 14501(c)(1); see *id.* § 41713(b)(4)(A).

[10] 2003 Me. Laws ch. 444 (emphasis added), available at http://www.maine.gov/ag/dynld/documents/pl444.pdf.

should be beyond dispute that delivering packages is a service of package delivery companies such as UPS, FedEx, and DHL. Further, by imputing knowledge of a package's contents based on the identity of the shipper or markings on the package, the Tobacco Delivery Law expressly imposes additional obligations on carriers' distribution operations and deliveries. These express references to and direct regulation of carrier services can and should be the end of the inquiry under *Morales*. See 504 U.S. at 388.

But even beyond the Tobacco Delivery Law's express references to carriers' services, it is also clear that the law has a "forbidden significant effect upon" carriers' rates, routes, and services. *Ibid.* Given the volume of packages they handle on a daily basis, it is something of an understatement to say that the operations of carriers such as UPS, FedEx, and DHL "depend upon an orderly flow of packages." *United Parcel Serv., Inc.* v. *Flores-Galarza*, 318 F.3d 323, 336 (1st Cir. 2003). Indeed, on average, UPS and FedEx alone ship about 20,000,000 packages a day in the United States.[11] "When you handle millions of packages, a minute's delay can cost a fortune[.]" Claudia H. Deutsch, *Still Brown, But Going High Tech*, N.Y. TIMES, July 12, 2007, at C1 (internal quotation marks omitted); see also, *e.g.*, *Fed. Express Corp.*, 936 F.2d at 1077 ("Federal Express guarantees delivery by 10:30 a.m. the day after a package has been picked up. There is a full refund if a package is even one minute late. To keep this schedule, even the most minor delays must be avoided[.]").

These carriers "can only provide timely package delivery if [they] follow[] uniform procedures" for processing and delivering packages (Pet. App. 28), and all have therefore invested billions of dollars in developing, standardizing, and

[11] See FedEx, 2007 Annual Report at 40, 42, available at http://tinyurl.com/2hj4h6; UPS 2006 Annual Report, Form 10-K, at 20, available at http://tinyurl.com/2c4564.

fine-tuning their processes (*e.g.*, Deutsch, *supra*). The result is "a science that many companies aspire to: uniform business processes * * * worldwide * * * and a detailed plan of how products move through the pipeline." Jennifer Baljko Shah, *FedEx's Hub of Supply Chain Activity*, ELECTRONIC BUYERS' NEWS, May 10, 2001, available at http://tinyurl.com /3a5b22. Uniformity begins at the "hub"[12] and extends outward, establishing consistent practices and procedures for pickups and deliveries worldwide.

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[12] For a description of UPS's hub in Louisville, Kentucky, see JOHN MCPHEE, UNCOMMON CARRIERS 163-84 (2006), originally published as *Out in the Sort: Lobsters, Bats, and Bentleys in the UPS Hub*, THE NEW YORKER, Apr. 18, 2005, at 161. As McPhee describes:

> If no problem develops along the way, a standard six-sided package going through the hub will be touched twice by human beings: as it is unloaded on entry and as it is loaded into a can after its trip through what the UPS workers universally call "the sort." Some five thousand workers come nightly to the sort, but few of them ever touch a package, which is largely what the hub is about, as it carries automation off the scale of comprehension.

UNCOMMON CARRIERS at 164. "The sort" consists of "[a] hundred and twenty-two miles of belts and monorails" packed into a space "a scant half-mile long." *Id.* at 165-66. A package entering "the sort" typically arrives at the airplane headed for its destination in about eight to ten minutes, having traveled at least two miles in the process. *Id.* at 163, 165-68.

FedEx's "World Hub" or "Memphis Super Hub" in Memphis, Tennessee, similarly utilizes three hundred miles of conveyor belts to process 3.3 million packages a day. *See* FedEx Newsroom, World Hub, at http://news.van.fedex.com/taxonomy/term/1056. DHL's U.S. hub, with 7,000 employees supporting 115 aircraft, is in Wilmington, Ohio. *See* Deutsche Post World Net, *Cleared for Take-Off*, at http://www.dpwn.de/dpwn?skin=hi&check=yes&lang =de_EN&xmlFile=2007711.

State laws such as the Maine Tobacco Delivery Law threaten to disrupt this uniformity by imposing on carriers delivery requirements and policing and investigative responsibilities that vary from State to State. For example, while Maine statutes apply to all tobacco products, laws in Alaska, Connecticut, Louisiana, New York, Texas, Virginia, and Washington apply to cigarettes only.[13]

The diversity of state-law signature and identification-check requirements are particularly burdensome for "national and regional carriers attempting to conduct a standard way of doing business" (H.R. CONF. REP. NO. 103-677, *supra*, at 87). The Maine Tobacco Delivery Law requires carriers (i) to confirm that the purchaser and the addressee are one and the same, (ii) to confirm that the purchaser/addressee is at least eighteen years old, including checking government-issued identification, and (iii) to obtain the purchaser/addressee's signature. 22 ME. REV. STAT. § 1553(C). In contrast, Arizona and Indiana permit delivery to any adult designated by the purchaser,[14] Delaware and Oklahoma permit delivery to any adult residing at the purchaser's address,[15] and Nevada and West Virginia permit any adult to accept delivery.[16]

Finally, the Maine Tobacco Delivery Law obligates carriers to cross-reference all packages destined for delivery in the State against a list of known unlicensed tobacco retailers

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[13] ALASKA STAT. § 43.50.105(c); CONN. GEN. STAT. § 12-285c; LA. REV. STAT. ANN. §47:871-:878; N.Y. PUB. HEALTH LAW § 1399-ll(2); TEX. HEALTH & SAFETY CODE ANN. § 161.451; VA. CODE ANN. § 18.2-246.7; WASH. REV. CODE § 70.155.105(4)(b).

[14] ARIZ. REV. STAT. § 42-3225(A)(2); IND. CODE ANN. § 24-3-5-5(a)(1)(A).

[15] 30 DEL. CODE ANN. § 5365(a)(2); 68 OKLA. STAT. § 317.4(A)(2)(a).

[16] NEV. REV. STAT. § 202.24935(2), amended by 2007 Nev. Laws ch. 434, § 42 (clerical amendment); W. VA. CODE ANN. § 16-9E-4(a)(2).

provided by the Maine Attorney General. 22 ME. REV. STAT. § 1555(D). The lists contains hundreds of web addresses, e-mail addresses, physical addresses, names, and telephone numbers of such unlicensed retailers.[17] Obligating carriers to check all shippers against such a lengthy list, presumably subject to continuous revision by the State, inevitably would have a significant effect on carriers' services "by forcing [them] to change [their] uniform package-processing procedures." Pet. App. 28. Moreover, significant interference with carriers' uniform practices would, just as Congress feared (see *supra* pages 6-7), increase costs and, by extension, increase the rates paid by consumers.

While the Maine Tobacco Delivery Law would thus significantly affect carriers' services and rates even in isolation, its effects are only the tip of the iceberg under petitioner's limited concept of FAAAA preemption. To begin with, under petitioner's approach, ***every*** State could regulate tobacco deliveries, each imposing a different checklist of delivery requirements and distributing its own unique "do not ship" list. Inconsistencies have already developed to some extent and would certainly accelerate if this Court were to reverse the decision below. Therefore, the effect of the Maine law must be evaluated not only with regard to its direct consequences but also by considering the likely impact if some or all other States were to enact similar but varying regulatory regimes.[18]

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[17] See State of Maine, Office of the Atty. Gen., Tobacco Delivery Compliance Page, at http://www.maine.gov/ag/tobacco/delivery_compliance.html (last visited October 9, 2007). Although the Attorney General's website states that the list of unlicensed retailers is "confidential," citing 22 ME. REV. STAT. § 1555(D)(1), the 36-page list is posted on its website.

[18] See, *e.g.*, *Morales*, 504 U.S. at 389 ("Since taxes and surcharges vary from State to State, the requirement that advertised fares include those charges forces the airlines to create different ads in each market."); cf. *Healy* v. *The Beer Inst.*, 491 U.S. 324,

Moreover, the significant potential effect of numerous and varying state tobacco delivery laws is still only a small part of the story because there is no logical or statutory basis for limiting petitioner's arguments to tobacco. Rather, petitioner argues that the FAAAA contains an implied exception authorizing States to regulate the delivery of an undefined category of "dangerous substances" so long as they are captioned as "public health laws." Pet.'s Br. at, *e.g.*, i, 2-3, 18, 22, 30, 34, 37, 42, 48. It is not unduly speculative to posit that, if given the opportunity, at least some States (or even individual cities) would expand this category to include CDs or DVDs,[19] video games,[20] unhealthy or politically incorrect foods,[21] books,[22] diet aids,[23] herbal remedies,[24] or even cloth-

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336 (1989) ("[T]he practical effect of the statute must be evaluated not only by considering the consequences of the statute itself, but also by considering how the challenged statute may interact with the legitimate regulatory regimes of other States and what effect would arise if not one, but many or every, State adopted similar legislation.").

[19] Cf., *e.g.*, *Tipper Gore Widens War on Rock*, N.Y. TIMES, Jan. 4, 1988, at C18.

[20] Cf., *e.g.*, *Am. Amusement Mach. Ass'n* v. *Kendrick*, 244 F.3d 572 (7th Cir. 2001) (invalidating an Indianapolis ordinance that sought to limit the access of minors to video games that depict violence); Alex Pham, *Video Games; Marathon Sessions Take Over Players: Is That Sick?*, L.A. TIMES, June 22, 2007, at C1 (noting that some doctors are lobbying the American Medical Association to designate "video game addiction" as a "formal medical condition").

[21] Cf., *e.g.* John Stossel, *Trans Fat Ban is "Nanny State" Intrusion*, ABCNEWS.com, Dec. 6, 2006, at http://abcnews.go.com/2020/story?id=2705411&page=1; AP, *Angry Chefs Cook Up Lawsuit Over Foie Gras Ban*, Aug. 22, 2006, available at http://www.msnbc.msn.com/id/14472971/.

[22] Cf., *e.g.*, *Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26* v. *Pico*, 457 U.S. 853, 856-58 (1982).

ing.[25] Indeed, in an attempt to police identity theft, a State might exercise its "police power" to require carriers to check identification for ***all*** consumer deliveries, deliver only to the purchaser, and/or cross-check addresses against a list of known identity thieves. Given that petitioner's theory logically would support all of these categories of regulation, their potential effects must also be considered.

In short, if States are allowed to regulate the delivery of anything they deem "dangerous" or "unhealthy," varying regulatory regimes imposing different delivery requirements and "unlicensed retailer" lists for various products will quickly create the sort of "patchwork" system the FAAAA was intended to avoid.[26] "The sheer diversity of [such] regulatory schemes [would once again become] a huge problem

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[23] Cf., *e.g.*, Mayo Clinic, *Weight-Loss Pills: What Can Diet Aids Do For You?* (warning that some popular weight-loss pills "are downright dangerous"), at http://www.mayoclinic.com/health/weight-loss/HQ01160.

[24] Cf., *e.g.*, Justin Gillis, *Herbal Remedies Turn Deadly for Patients*, WASH. POST, Sept. 5, 2004, at A01 ("dangerous herbal remedies can be hyped on the Internet").

[25] Cf., *e.g.*, Greg Bluestein, *Atlanta Baggy-Pants Ban Debate Drags On*, ABCNEWS.com, Aug. 22, 2007, available at http://abcnews.go.com/US/wireStory?id=3534917.

[26] Petitioner and his *amici* cite various existing state statutes that they believe are not preempted by the FAAAA. Pet. Br. at nn.36-37 and accompanying text; Br. of California et al. at 16 & nn.12-17 and 18-19 & nn.18-24. Many of these statutes simply prohibit the knowing transportation of one commodity or another and do not include burdensome signature/identification requirements or obligations to cross-reference packages against lengthy "unlicensed retailer" lists. *E.g.*, 17-A ME. REV. STAT. § 1001(1); N.Y. AGRIC. & MKTS. LAW § 96-z-11; ARIZ. REV. STAT. ANN. § 13-3502. Such statutes are therefore akin to the general prohibition on "knowing transportation" upheld below and not at issue here. Pet. App. 26.

for national and regional carriers attempting to conduct a standard way of doing business." H.R. CONF. REP. NO. 103-677, *supra*, at 87. Accordingly, in addition to expressly referencing carriers' services, the Maine Tobacco Delivery Law is preempted because it would have a "forbidden significant effect upon fares." *Morales*, 504 U.S. at 388.

IV. The Structure Of Federal Motor Carrier Regulation As A Whole Confirms That There Is No "Dangerous Substances" Exception To FAAAA Preemption.

Petitioner's attempt to create an unenumerated "dangerous substances" exception to FAAAA preemption is also inconsistent with the Act's specifically enumerated exceptions and the structure of federal motor carrier regulation as a whole. The FAAAA specifically provides that it does not preempt:

> [i] the safety regulatory authority of a State with respect to motor vehicles, [ii] the authority of a State to impose highway route controls or limitations based on the size or weight of the motor vehicle or the hazardous nature of the cargo, or [iii] the authority of a State to regulate motor carriers with regard to minimum amounts of financial responsibility relating to insurance requirements and self-insurance authorization.

49 U.S.C. §§ 14501(c)(2)(A), 41713(b)(4)(B).

However, consistent with the underlying goal of facilitating interstate commerce and promoting efficiency through uniformity, each of these "saved" areas is subject to a separate federal regulatory scheme—each with its own preemptive effect. For example, the Motor Carrier Safety Act of 1984, Pub. L. No. 98-554, tit. II, 98 Stat. 2832, provides for review by the Secretary of Transportation (the "Secretary") of state laws and regulations concerning commercial motor vehicle safety. 49 U.S.C. § 31141(a)-(b). The Secretary is empowered to declare any such state law preempted if he de-

termines that it is more stringent than the federal law and has "no safety benefit," is "incompatible" with federal law, or "would cause an unreasonable burden on interstate commerce." *Id.* § 31141(c)(4).[27] As this Court has recognized, the power to review and preempt state safety laws "affords the Secretary * * * a means to prevent the safety exception [to FAAAA preemption] from overwhelming [Congress's] deregulatory purpose." *City of Columbus* v. *Ours Garage & Wrecker Serv., Inc.*, 536 U.S. 424, 441 (2002). "Under this authority, the Secretary can invalidate local safety regulations upon finding that their content or multiplicity threatens to clog the avenues of commerce." *Id.* at 441-42.

With respect to highway route controls based on vehicle size and weight, under the Surface Transportation Assistance Act of 1982 ("STAA"), Pub. L. No. 97-424, 96 Stat. 2097 (1983), state law must conform to federal guidelines concerning vehicle length (49 U.S.C. § 31111), vehicle width (*id.* § 31113), and vehicle weight (23 U.S.C. § 127). In addition, States may not unreasonably limit the access of motor carriers traveling on the federal highway system to off-highway terminals; food, fuel, and rest facilities; and points of loading and unloading. 49 U.S.C. § 31114. "One of the main purposes of Congress in passing the STAA was to enhance interstate commerce" and "improve the productivity of truckers by establishing more uniform weight and length limits on federal roads across the country." *Nat'l Freight, Inc.* v. *Lar-*

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[27] Additionally, the Surface Transportation Assistance Act of 1982, Pub. L. No. 97-424, §§ 401-404, 96 Stat. 2097, 2154-2157, authorized the Motor Carrier Safety Assistance Program ("MCSAP"). Under MCSAP, the Secretary is directed to prescribe guidelines and standards "for ensuring compatibility of intrastate commercial motor vehicle safety laws" with federal laws. 49 U.S.C. § 31104(h). Congress directed that the guidelines and standards shall be flexible, "while ensuring the degree of uniformity that will not diminish transportation safety." *Id.*

son, 760 F.2d 499, 506-07 (3d Cir. 1985); see also *United States* v. *Connecticut*, 566 F. Supp. 571, 576 (D. Conn.) (Cabranes, J.) ("[I]t is manifest that the STAA reflects a congressional interest in establishing uniform regulations governing the size, weight, and arrangements of trucks used in interstate commerce."), aff'd mem., 742 F.2d 1443 (2d Cir. 1983), aff'd mem., 465 U.S. 1014 (1984).

State route controls based on the "hazardous nature of * * * cargo" are also subject to a pre-existing federal regulatory scheme that promotes uniformity. The Hazardous Materials Transportation Uniform Safety Act of 1990 ("HMTUSA"), Pub. L. No. 101-615, 104 Stat. 3244 (1990), authorizes the Secretary to establish standards and guidelines for state laws governing the highway routing of hazardous materials. 49 U.S.C. § 5112. Such laws can be enforced only if they comply with the Secretary's standards, and directly affected parties may apply to the Secretary for a determination as to whether a state law is compliant or preempted. *Id.* § 5125(c)-(d). Thus, yet again, "uniformity was the linchpin in the design of the statute." *Colo. Pub. Utils. Comm'n* v. *Harmon*, 951 F.2d 1571, 1575 (10th Cir. 1991).[28]

With respect to the final exception to FAAAA preemption, Congress recently created the Uniform Carrier Registration System ("UCRS") to act as a clearinghouse and depository for, *inter alia*, proof of insurance and financial responsibility so that interstate motor carriers would not be subject to

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[28] See also, *e.g.*, HMTUSA, *supra*, § 2, 104 Stat. at 3245 (finding that state and local laws were "creating the potential for * * * confounding * * * carriers which attempt to comply with [their] multiple and conflicting * * * requirements"); S. REP. NO. 93-1192 at 37 (1974) (noting that the prior version of the statute was intended "to preclude a multiplicity of State and local regulations and the potential for varying as well as conflicting regulations in the area of hazardous materials transportation").

the varying requirements of individual States.[29] The UCRS replaces and improves upon the former "Single-State Registration System," which required interstate motor carriers to register with one State and provided that such "single State registration" would be deemed to satisfy the registration requirements of all other States (see *Yellow Transp., Inc.* v. *Michigan*, 537 U.S. 36, 39 n.* (2002)).

Thus, in each case in which Congress specifically exempted a category of state laws from FAAAA preemption, it did so with the understanding that a separate federal statute would act as a preemptive check on any burdensome state regulation and thereby provide the necessary degree of uniformity. See, *e.g.*, *Ours Garage*, 536 U.S. at 441. Moreover, the comprehensive federal regulatory structure these statutes create demonstrates an overriding federal policy of uniform, national regulation of the industry. Even where States have retained a role, they have done so within limits and subject to federal preemption. There are no loose ends that would allow States to exercise unfettered regulatory discretion over some aspect of the industry. Yet that is precisely what petitioner seeks. Given that Congress expressly saved state laws from FAAAA preemption only where another federal statute already filled the preemptive void, it is simply implausible that it *sub silentio* intended to save an undefined category of "dangerous substances" laws without a similar federal backstop in place.

V. There Is No "Presumption Against Preemption" When A State Attempts To Regulate In An Area That Is Historically A Subject Of Federal Regulation.

Contrary to petitioner's argument (Pet. Br. at 25), there is no "presumption against preemption" when, as in this case,

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[29] The Uniform Carrier Registration Act of 2005 was part of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users or "SAFETEA-LU." See Pub. L. No. 109-59, §§ 4301-08, 114 Stat. 1144, 1761-74 (2005).

"the State regulates in an area where there has been a history of significant federal presence." *United States* v. *Locke*, 529 U.S. 89, 108. In other words, when a State extends its "police power" into an area of traditional federal concern—rather than vice versa—any such benefit of the doubt disappears. That is precisely what occurred here: The trucking industry has long been a subject of extensive federal regulation, and the Maine Tobacco Law has ventured well beyond the State's core police power to directly regulate motor carriers' services and thereby disrupt federal regulatory policy.

Indeed, almost from its inception, the trucking industry has been the subject of significant federal regulation. As intra- and inter-city roads improved in the early 1900s, the trucking industry became a viable competitor to the railroads. *See* WILLIAM R. CHILDS, TRUCKING AND THE PUBLIC INTEREST: THE EMERGENCE OF FEDERAL REGULATION 1914-1940, at 14 (1985). In order to fend off this competition, the railroads successfully lobbied for state regulation of motor carriers. *See* LAWRENCE S. ROTHENBERG, REGULATION, ORGANIZATION, AND POLITICS: MOTOR FREIGHT POLICY AT THE INTERSTATE COMMERCE COMMISSION 44 (1994); Thomas Gale Moore, *Unfinished Business in Motor Carrier Deregulation*, 14 REGULATION No. 3 (1991), available at http://www.cato.org/pubs/regulation/regv14n3/reg14n3-moore.html. In a series of cases in the mid-1920s, however, this Court held that state regulation of interstate motor carriers beyond general and reasonable highway safety legislation was "forbidden by the commerce clause." *Buck* v. *Kuykendall*, 267 U.S. 307, 316 (1925); accord, *e.g.*, *Mich. Pub. Utils. Comm'n* v. *Duke*, 266 U.S. 570, 576-78 (1925); *George W. Bush & Sons Co.* v. *Maloy*, 267 U.S. 317, 324-25 (1925).

In an attempt to fill the gap created by this Court's invalidation of state regulations of interstate carriers, the first proposal in Congress for federal motor carrier regulation was introduced in 1925. *See* ROTHENBERG, *supra*, at 45. Federal regulation first began to take hold with the passage of the Na-

tional Industrial Recovery Act, Pub. L. No. 73-67, 48 Stat. 195 (1933), and a brief period of federally sponsored self-regulation under the auspices of the National Recovery Administration. However, self-regulation proved generally unworkable and ultimately was held unconstitutional by this Court. See *A.L.A. Schechter Poultry Corp.* v. *United States*, 295 U.S. 495 (1935).

Finally, these events led to passage of the Motor Carrier Act of 1935 (the "1935 Act"), Pub. L. No. 74-255, 49 Stat. 543 (1935). The 1935 Act brought about comprehensive federal regulation of the motor carrier industry by giving the Interstate Commerce Commission broad regulatory control over, among other things, motor carrier rates, routes, and services. This comprehensive regulatory scheme remained virtually unchanged until Congress began deregulating the industry with passage of the Motor Carrier Act of 1980. *See* Part I, *supra*.

Against this backdrop, petitioner tries to back away from this realm "of significant federal presence" (*Locke*, 529 U.S. at 108) by casting the challenged provisions of the Maine Tobacco Delivery Law as mere "public health" measures, not motor carrier regulations. But whatever their ***purpose***, the undeniable ***subject*** of these provisions is the delivery of packages by motor carriers covered by the FAAAA. See generally *Gade* v. *Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 105-07 (1992). The remainder of Maine's statutory framework for addressing the issue of smoking is not being challenged. Rather, the challenge is limited to those provisions of the law that relate directly to carriers' operations, services, and deliveries. These provisions are not immunized from preemption simply because they were enacted together with others that have nothing to do with carriers.

Moreover, invoking an artificial interpretive presumption is unnecessary and unhelpful in a case such as this, which does not turn on notions of obstacle preemption or conflict preemption. Congress not only made clear that state

laws relating to carriers' rates, routes, and services are preempted but also incorporated by reference specific case law from this Court. Given that Congress's intent to preempt state law is clear, there is simply no basis for giving the FAAAA an artificially narrow reading. Rather, because the Supremacy Clause provides that federal law "shall be the supreme Law of the land, * * * any Thing in the Constitution or Laws of any State to the Contrary notwithstanding" (U.S. CONST. art. IV, cl. 2), the FAAAA's express preemption provisions should be given their natural meaning, and state laws "to the Contrary" should be disregarded, as the Constitution requires. See Caleb Nelson, *Preemption*, 86 VA. L. REV. 225, 234-46, 254-60, 290-303 (2002).

VI. Congress Has Not Endorsed Or Approved The Maine Tobacco Delivery Law.

Petitioner also argues that the Synar Amendment, Pub. L. No. 102-321, tit. II, § 202, 106 Stat. 323, 394 (1992), authorizes the Maine Tobacco Delivery Law. See Pet.'s Br. 3-4, 19, 37-40. Neither the Synar Amendment nor its implementing regulations, however, have anything to say on the subject of motor carrier regulation or regulation of internet sales of tobacco. See 42 U.S.C. 300x-26; 45 C.F.R. § 96.130. Indeed, they do not confer any new power on the States but rather simply offer federal funds in return for enacting and enforcing youth smoking laws and achieving certain benchmarks. Moreover, nothing in the federal grant program implies that state laws are saved from preemption under other federal statutes simply because they are enacted in pursuit of federal funds. Petitioner's argument that the Maine Tobacco Delivery Law and the HHS grant program share a "common purpose" (Pet.'s Br. at 25) thus ignores the fact that the Maine law is at cross-purposes with the FAAAA. Put simply, the State is not free to ignore federal law simply because it is pursuing ***some*** other objective that the federal government generally supports.

Congress is certainly aware of the issues that the Maine Tobacco Delivery Law seeks to address. For example, the Tobacco Free Internet for Kids Act of 2003 (H.R. 3047), the Internet Tobacco Sales Enforcement Act (H.R. 2824), and the Prevent All Cigarette Trafficking Act ("PACT Act") (S. 1177) were all introduced during the 108th Congress. The PACT Act was reintroduced in the 109th Congress (S. 3810) and is currently pending in the 110th Congress (S. 1027). Although none of these bills has yet become law, their introduction confirms that Congress can regulate in this area should it deem it appropriate to do so. And, more important, only Congress can regulate in a manner that ensures that any new obligations imposed on the motor carrier industry are consistent with the whole of federal motor carrier regulation and are uniform nationwide.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

ROBERT DIGGES, JR.
ATA Litigation Center
950 N. Glebe Road, Suite 210
Arlington, VA 22203-4181
(703) 838-1865

ROBIN S. CONRAD
AMAR D. SARWAL
National Chamber
Litigation Center, Inc.
1615 H Street, NW
Washington, DC 20062
(202) 463-5337

EVAN M. TAGER
Counsel of Record
JACK L. WILSON
Mayer Brown LLP
1909 K Street, NW
Washington, DC 20006
(202) 263-3000

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In The Supreme Court of the United States

G. STEVEN ROWE, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF THE STATE OF MAINE,

Petitioner,

v.

NEW HAMPSHIRE MOTOR TRANSPORT ASSOCIATION, MASSACHUSETTS MOTOR TRANSPORTATION ASSOCIATION, INC. and VERMONT TRUCK & BUS ASSOCIATION, INC.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

BRIEF OF CALIFORNIA, ALABAMA, ALASKA, ARIZONA, ARKANSAS, CONNECTICUT, DELAWARE, DISTRICT OF COLUMBIA, FLORIDA, HAWAII, IDAHO, ILLINOIS, INDIANA, IOWA, KENTUCKY, MARYLAND, MASSACHUSETTS, MICHIGAN, MINNESOTA, MISSISSIPPI, MONTANA, MISSOURI, NEVADA, NEW MEXICO, NEW YORK, NORTH DAKOTA, OHIO, OKLAHOMA, OREGON, PENNSYLVANIA, PUERTO RICO, RHODE ISLAND, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, UTAH, VERMONT, WEST VIRGINIA, WISCONSIN, AND WYOMING AS AMICUS CURIAE SUPPORTING PETITIONER

EDMUND G. BROWN JR.
Attorney General of the State of California
THOMAS J. GREENE
Chief Assistant Attorney General
MANUEL MEDERIOS
Solicitor General
DENNIS ECKHART
Senior Assistant Attorney General
LAURA KAPLAN
Deputy Attorney General
Counsel of Record
1300 I Street
P.O. Box 944255
Sacramento, CA 94244-2550
Telephone: (916) 323-3822
Fax: (916) 323-0813
Counsel for Amicus Curiae

[Additional Counsel Listed On Inside Cover]

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

TROY KING
Attorney General
State of Alabama
11 South Union Street
Montgomery, AL 36130

TALIS J. COLBERG
Attorney General
State of Alaska
P.O. Box 110300
Juneau, AK 99811

TERRY GODDARD
Attorney General
State of Arizona
1275 West Washington
Phoenix, AZ 85007

DUSTIN MCDANIEL
Attorney General
State of Arkansas
323 Center Street, Suite 200
Little Rock, AR 72201

RICHARD BLUMENTHAL
Attorney General
State of Connecticut
55 Elm Street
Hartford, CT 06106

CARL C. DANBERG
Attorney General
State of Delaware
820 N. French Street
6th Floor
Wilmington, DE 19801

LINDA SINGER
Attorney General
District of Columbia
One Judiciary Square
441 4th Street, N.W.
Suite 600 South
Washington, DC 20001

BILL MCCOLLUM
Attorney General
State of Florida
The Capitol, PL-01
1305 E. Walnut Street
Tallahassee, FL 32399-1050

MARK J. BENNETT
Attorney General
State of Hawaii
425 Queen Street
Honolulu, HI 96813

LAWRENCE WASDEN
Attorney General
State of Idaho
P.O. Box 83720
Boise, ID 83720-0010

LISA MADIGAN
Attorney General
State of Illinois
100 West Randolph Street,
12th Floor
Chicago, IL 60601

STEVE CARTER
Attorney General
State of Indiana
Indiana Government Center
South – Fifth Floor
302 W. Washington Street
Indianapolis, IN 46204

THOMAS J. MILLER
Attorney General of
State of Iowa
Hoover State Office Bldg.
Des Moines, IA 50319

MICHAEL PLUMLEY
Assistant Attorney General
State of Kentucky
700 Capitol Avenue, Suite 118
Frankfort, KY 40601

MARTHA COAKLEY
Attorney General
State of Massachusetts
McCormack Building
One Ashburton Place
Boston, MA 02108

DOUGLAS F. GANSLER
Attorney General
State of Maryland
200 St. Paul Place
Baltimore, MD 21202

MICHAEL A. COX
Attorney General
State of Michigan
P.O. Box 30212
Lansing, MI 48909

LORI SWANSON
Attorney General
State of Minnesota
102 State Capitol
75 Rev. Dr. Martin Luther
King, Jr. Blvd.
St. Paul, MN 55155-1609

JIM HOOD
Attorney General
State of Mississippi
P.O. Box 220
Jackson, MS 37205-0220

JEREMIAH W. (JAY) NIXON
Attorney General
State of Missouri
Supreme Court Building
207 W. High Street
Jefferson City, MO 65102

MIKE MCGRATH
Attorney General
State of Montana
P.O. Box 201401
Helena, MT 59620-1401

CATHERINE CORTEZ MASTO
Attorney General
State of Nevada
100 North Carson Street
Carson City, NV 89701

GARY K. KING
Attorney General
State of New Mexico
P.O. Drawer 1508
Santa Fe, NM 87504

ANDREW M. CUOMO
Attorney General
State of New York
120 Broadway, 25th Floor
New York, NY 10271

WAYNE STENEHJEM
Attorney General
State of North Dakota
600 E. Boulevard Avenue
Bismarck, ND 58505-0040

MARC DANN
Attorney General
State of Ohio
30 East Broad Street,
17th Floor
Columbus, OH 43215

W.A. DREW EDMONDSON
Attorney General
State of Oklahoma
313 N.E. 21st Street
Oklahoma City, OK
73105-4894

HARRY MYERS
Attorney General
State of Oregon
1162 Court Street NE
Salem, OR 97301

THOMAS W. CORBETT, JR.
Attorney General
State of Pennsylvania
16th Floor, Strawberry
Square
Harrisburg, PA 17120

ROBERTO J. SANCHEZ-RAMOS
Secretary of Justice
Commonwealth of
Puerto Rico
GPO Box 902192
San Juan, PR 00902-0192

PATRICK C. LYNCH
Attorney General
State of Rhode Island
150 South Main Street
Providence, RI 02903

HENRY MCMASTER
Attorney General
State of South Carolina
P.O. Box 11549
Columbia, SC 29211

LAWRENCE E. LONG
Attorney General
State of South Dakota
1302 E Highway 14, Suite 1
Pierre, SD 57501-8501

ROBERT E. COOPER, JR.
Attorney General and
Reporter of Tennessee
P.O. Box 20207
Nashville, TN 37202-0207

MARK L. SHURTLEFF
Attorney General
State of Utah
Utah State Capitol Complex
East Office Bldg., Suite 320
Salt Lake City, UT
84114-2320

WILLIAM H. SORRELL
Attorney General
State of Vermont
109 State Street
Montpelier, VT 05609-1001

DARRELL V. MCGRAW, JR.
Attorney General
State of West Virginia
State Capitol Building 1,
Room 26-E
Charleston, WV 25305

J.B. VAN HOLLEN
Attorney General
State of Wisconsin
Wisconsin Department of
Justice
P.O. Box 7857
Madison, WI 53707-7857

KRISTIE LANGLEY
Assistant Attorney General
Wyoming Attorney
General's Office
123 Capitol Avenue
Cheyenne, WY 82002

QUESTIONS PRESENTED

1. Whether the Federal Aviation Administration Authorization Act of 1994 (FAAAA), 49 U.S.C. §§ 14501(c)(1) and 41713(b)(4)(A) (2000), preempts states from exercising their historic public health police powers to regulate carriers that deliver contraband such as tobacco and other dangerous substances to children; and

2. Whether the FAAAA preempts states from exercising their historic public health police powers to require shippers of contraband such as tobacco and other dangerous substances to utilize a carrier that provides age verification and signature services to ensure that such substances are not delivered to children.

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INTEREST OF THE AMICI

It is beyond dispute that the states have a strong interest in ensuring that tobacco products purchased over the Internet are not delivered to children. For that reason, at least 40 states prohibit or severely restrict the direct delivery of tobacco products to consumers purchased from Internet vendors. The First Circuit struck down a Maine statute that is designed to curb tobacco sales to children by requiring carriers to comply with modest delivery and labeling restrictions. Unless the Court rejects respondent's limitless view of preemption, the most effective and practical tool that states employ to restrict illegal sales of tobacco to children over the Internet will be undermined, and will allow carriers to be utilized as conduits for illegal tobacco sales.

Internet tobacco sites have increased more than eight-fold in recent years. Unfortunately, a majority of online tobacco retailers have no safeguards or controls to prevent illegal sales to children. Virtually all online sellers simply do not enforce age restrictions. States have been working together on aggressive law enforcement strategies to quell this insidious problem. Several have sued Internet tobacco retailers who flout state laws prohibiting or severely restricting the transport and delivery of tobacco products directly to consumers.

The most effective method to prevent illegal sales to children via the Internet and other non-face-to-face means, however, is to regulate the carriers that transport and deliver the products. Statutes such as Maine's Tobacco Delivery Law thwart minors attempting to purchase cigarettes and other tobacco products over the Internet by requiring carriers to comply with simple delivery and

age-verification requirements when a package is labeled as "tobacco." Most states that restrict online tobacco sales are similar to Maine's law. They typically require that tobacco retailers be licensed by the state and that containers be labeled as containing cigarettes or tobacco products. They usually also impose an obligation to ensure compliance with states' age-verification requirements on the retailer or directly on the carrier.

The carriers' claim that they are significantly burdened by the requirements imposed by Maine's statute does not ring true. They are already implementing a number of the requirements pursuant to an agreement with the State of New York to stop shipping cigarettes to individual consumers in all 50 states. For example, UPS has entered into an Assurance of Discontinuance with New York in which UPS agreed to adopt a formal policy expressly prohibiting the shipment of cigarettes to individual consumers in the United States and accepting shipments of cigarettes only to recipients who are licensed to receive such shipments.[1] (Other carriers have entered into similar agreements.)[2]

Pursuant to its agreement, UPS has amended its Terms and Conditions of Service and its General Tariff Containing the Classifications, Rules and Practices for the Transportation of Property ("the UPS tariff") to include its

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[1] Assurance of Discontinuance between United Parcel Service, Inc. and the Attorney General of the State of New York, October 25, 2005. Assurance found at <http://www.oag.state.ny.us/press/2005/oct/9tiupsaodfinal.oct.pdf> (visited August 19, 2007).

[2] FedEx and DHL agreements can be found at: <http://www.oag.state.ny.us/press/2006/feb/FedEx%20-%20Executed%20AOC.pdf> (visited August 19, 2007); and <http://www.oag.state.ny.us/press/2005/jul/dhlaogfinal.pdf> (visited August 19, 2007).

cigarette policy.[3] UPS does not offer a contractual service for the delivery of cigarettes to consumers. Additionally, UPS (1) accepts packages containing tobacco or tobacco products, as those terms are variously defined under applicable state law, only from shippers who are licensed and authorized to ship tobacco and tobacco products pursuant to applicable laws, (2) maintains a database that includes information regarding cigarette retailers, and (3) instructs its drivers, sorters and pre-loaders to actively look for indications that a package contains cigarettes being shipped to an individual consumer, alerting UPS management of such packages and attempting to intercept such packages.[4]

If respondents' expansive view of preemption were to become the law of the land, tobacco laws in Maine and 39 other states would be undercut, and state restrictions on the delivery of myriad other dangerous products that have been traditionally regulated under states' police powers, including explosives, liquor, drugs, poisonous reptiles, and wild animals would be threatened. It makes no sense to say that states can enact laws to ensure that tobacco products are not delivered to children, while taking away the most effective means of enforcing those laws. Reversal of the First Circuit's decision will ensure that states are not precluded from using the most effective tool they have to restrict illegal tobacco sales to children over the Internet.

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[3] Report Regarding UPS's Compliance with the Assurance of Discontinuance, Dec. 20, 2005. Report reproduced in the addendum to the Attorney General's Reply Brief before the First Circuit, at A-21 – A-26.

[4] *Id.* at 4.

SUMMARY OF THE ARGUMENT

The question presented here is not whether the FAAAA's preemption provisions are broadly worded. They are. The question, rather, is whether Congress intended to preempt state laws restricting the delivery of dangerous or age-restricted products – such as tobacco – where a common carrier, such as United Parcel Service (UPS), is used as a conduit for the illegal transactions. It did not.

The FAAAA was enacted in 1994 for the purpose of limiting the economic authority of states over motor carriers and creating a level playing field with air carriers who were not subject to such regulation after enactment of the Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1705 (ADA). Before the FAAAA, states subjected motor carriers to a great deal of economic regulation such as price controls, tariff filings and the like. Notwithstanding respondent's claim to the contrary, neither the plain language of the statute nor the legislative history indicates in any way that Congress intended to preempt states from enacting legislation, such as Maine's Tobacco Delivery Law, to protect the public health of their citizens, especially children, from the pernicious effects of tobacco use.

Two provisions of Maine's law are at issue here. One requires tobacco *retailers* to use carriers who will comply with Maine's age-verification laws when delivering tobacco products to consumers. The other imputes knowledge to the carrier – that the package contains tobacco products – if the package is marked as containing tobacco or the shipper appears on the Attorney General's unlicenced retailer list – The First Circuit relied on the broad interpretation of ADA preemption in *Morales v. Trans' World*

Airlines, 504 U.S. 374 (1992) in preempting those provisions of Maine's Tobacco Delivery Law. That expansive view was rejected by this Court in favor of a narrower preemption standard in cases decided since *Morales*, including *California Div. of Labor Standards Enforcement v. Dillingham Construction, Inc.*, 519 U.S. 316 (1997) and *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645 (1995).

Unless the Court reaffirms the narrower *Dillingham* and *Travelers'* standard in this case, the laws of 40 states that prohibit or severely restrict the transport and delivery of tobacco products to their citizens will be at risk of preemption. Moreover, if this Court were to accept Respondent's view of preemption, which is even more extensive than *Morales*, the result would be disastrous for the states. In that instance, myriad other state laws that "expressly reference" or merely mention the transportation or delivery of any number of dangerous or contraband products would be at risk, as well.

Respondent claims the provision of the Maine statute imposing on the *retailer* the obligation to ensure that tobacco products are not delivered to children, "expressly references" carrier services even though it does not do so directly. But according to the *Dillingham* standard, the law must act immediately and exclusively on carrier services. Maine's law does neither. Respondent also contends that both provisions of Maine's Tobacco Delivery Law have a "forbidden significant effect" on carrier services by interfering with the uniform delivery practices of the carriers. This claim is also baseless. Respondent never provided evidence that any of Maine's requirements (including age-verification, reading labels on tobacco packages or reviewing a list of unlicenced tobacco retailers)

imposes a significant economic burden on the carriers, as required for preemption under the FAAAA. Under the *Dillingham* and *Travelers'* test for a forbidden connection, any "burdens" imposed by Maine's law are indirect, peripheral and tenuous, and, consequently, are not subject to FAAAA preemption.

In *Dillingham* and *Travelers*, this Court declined to preempt state police power statutes that serve an important state interest and whose impact is too indirect, remote and tenuous to the purpose of ERISA. This Court should confirm that the narrowed preemption test set forth in *Dillingham* and *Travelers* is the appropriate standard under the FAAAA, as well. Maine's Tobacco Delivery Law and similar tobacco laws in other states that serve a critical public health purpose in ensuring that tobacco products are not delivered to children, at most, affect carrier services indirectly and should not be preempted.

ARGUMENT

I. FAAAA'S PREEMPTION PROVISION MUST BE INTERPRETED IN LIGHT OF THE PRESUMPTION AGAINST PREEMPTION OF STATE POLICE POWERS AND THE STRUCTURE AND PURPOSE OF THE FAAAA AS A WHOLE

Where, as here, a federal statute, contains an express preemption provision, the task of the reviewing court is "to identify the domain expressly preempted by that language." *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 484 (1996) (internal quotation marks omitted). As the Court has explained, "[a]lthough . . . analysis of the scope of the

preemption statute must begin with its text, . . . interpretation of that language does not occur in a contextual vacuum. Rather, that interpretation is informed by two presumptions about the nature of pre-emption." *Id.* at 484-85. Both presumptions highlight the importance of congressional purpose in determining whether a federal statute preempts state law. First, "[i]n all preemption cases, and particularly in those in which Congress has legislated . . . in a field which the states have traditionally occupied we start [this analysis] with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Id.* at 485-86 (internal citation and quotation marks omitted). Second, "analysis of the scope of the statute's preemption is guided by the oft-repeated comment . . . that the purpose of Congress is the ultimate touchstone in every preemption case. As a result, any understanding of the scope of a preemption statute must rest primarily on a fair understanding of *congressional purpose*." *Id.* at 485-86 (internal citations and quotation marks omitted). Congress's purpose regarding a statute's preemptive scope is discerned "primarily . . . from the language of the preemption statute and the statutory framework surrounding it. Also relevant, however, is the structure and purpose of the statute as a whole, as revealed not only in the text, but through the reviewing court's reasoned understanding of the way in which Congress intended the statute and its surrounding regulatory scheme to affect business, consumers, and the law." *Id.* at 486 (internal citation and quotation marks omitted).

A. Because Maine's Tobacco Delivery Law Is Crucial to Curb Rampant Illegal Tobacco Sales to Minors, the Presumption Against Preemption Applies with Full Force

The provisions of Maine's Tobacco Delivery Law at issue here require that a person who engages in delivery sales of tobacco products take a number of steps to ensure that those products are not delivered to children. Before shipping, the licensed tobacco retailer must provide the delivery service with the age of the purchaser; it must clearly mark the outside of the package with the retailer's name and state-retailer license number; and it must indicate that the contents are tobacco products. *Id.* § 1555-C(3)(A)-(B). ME. REV. STAT. ANN. tit. 22 (2004). The retailer must also *utilize a delivery service that requires* the purchaser to be the addressee; to be of legal age to purchase tobacco products and sign for the package; and, if under 27 years of age, to produce a valid government-issued photo identification that shows the addressee to be of legal age to purchase tobacco products. *Id.* § 1555-C(3)(C).

Under Maine's statute, a carrier is defined as "a person, including the United States Postal Service, who is engaged in the commercial delivery of letters, packages or other containers," *Id.* § 1551(1-C). The requirements imposed on the carrier by Maine's statute are: "(a) person may not knowingly transport or cause to be delivered to a person in [Maine] a tobacco product purchased from a person who is not licensed as a tobacco retailer in [Maine]," unless the delivery is to a licensed tobacco distributor or retailer. ME. REV. STAT. ANN. tit. 22, § 1555-D (2004). Additionally, "(a) person is deemed to know that a package contains a tobacco product if the package is marked in accordance with the requirements of [section

1555-C(3)(B)] or if the person receives the package from a person listed as an unlicenced tobacco retailer by the Attorney General." *Id.*

The presumption against preemption of Maine's Tobacco Delivery Law and similar laws in other states is particularly important in this case. Since at least the beginning of the last century, when this Court decided *Austin v. Tennessee*, 179 U.S. 343 (1900), it has been recognized that States are empowered to ameliorate cigarettes' "deleterious effects, particularly upon young people." *Id.* at 348. The Court has recognized that "tobacco use, particularly among children and adolescents, poses perhaps the single most significant threat to public health in the United States." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 161 (2000). This problem has become substantially more difficult to solve due to the recent boom in sales of tobacco products over the Internet.

Illegal Internet tobacco sales have reached epidemic proportions. The number of Internet cigarette vendors has risen from 88 in January 2000, to 772 in January 2006.[5] Unlike purchasing tobacco products in a brick-and-mortar store, where the seller can look the person in the eye and carefully examine the customer's government identification, there is no evidence that online tobacco sellers utilize any effective method of age-verification. The vast majority of Internet cigarette vendors simply do not prevent youths from purchasing cigarettes online. While 79.7% of vendors include

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[5] Kurt M. Ribisl, Annice E. Kim, Rebecca S. Williams, *Sales and Marketing of Cigarettes on the Internet: Emerging Threats to Tobacco Control and Promising Policy Solutions in Reducing Tobacco Use. Strategies, Barriers, and Consequences.* Washington, D.C.: National Academy Press.

minimum-age warnings on their home pages, only 26.7% feature them at the top of the page where they can be viewed without scrolling, the prevailing standard for Web design.[6] Such warnings are no substitute for valid age-verification procedures, and many of those warnings are likely to be missed by users. Internet cigarette vendors commonly use self-verification methods, asking users to type in a birth date (used by 18.8% of vendors) or stating a disclaimer that, by submitting an order, the customer is certifying that he/she is of legal age to purchase cigarettes (used by 31.5% of vendors). Only a handful of vendors use minimally adequate age-verification methods, such as requiring the submission of a photo ID (used by 7.7% of vendors) or age-verification at delivery (used by 10.1% of vendors).[7] California conducted an investigation that exposed the significant problem with Internet tobacco sales. Children visited 234 web sites and were able to purchase a carton of cigarettes from 129 sites. Only a few Internet retailers did anything more than ask the prospective purchaser to state that he or she was at least 18 years old.[8]

Respondent suggests that Maine could fulfill its public health goal by simply enforcing those portions of its Tobacco Delivery Law that apply only to tobacco retailers. Those provisions include requiring retailers to be licensed and verify age through a database of records or by obtaining a

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[6] Rebecca S. Williams, *Youth Access to Cigarettes Online: Advertised and Actual Sales Practices of Internet Cigarette Vendors* [Dissertation]. Chapel Hill: Health Behavior and Health Education, University of North Carolina School of Public Health (2005).

[7] *Id.*

[8] Jennifer A. Jensen, Norval J. Hickman III, Hope Landrine, & Elizabeth A. Klonoff, *Availability of Tobacco to Youth Via the Internet*, *JAMA*, 291(15), 1837 (2004).

copy of a government ID from the purchaser. Respondent also suggests that Maine, like California, could engage in sting operations to determine if tobacco retailers are complying with those regulations. Br. of Resp't in Opp'n to Pet for Writ of Cert. 16.

These suggestions would be helpful if the target of the stings were brick-and-mortar sellers. In face-to-face sales a tobacco retailer selling to a minor can be quickly identified and the statute can be effectively enforced. However, when the target of the sting is an online tobacco seller, it is extremely difficult to identify the seller, and hence, effectively enforce the statute. Moreover, an Internet sting is, for the most part, only helpful in identifying the *web site* from which the minor purchased the tobacco products and the carrier who delivered them. But simply identifying the online tobacco web sites selling tobacco products to children is insufficient to stop these illegal sales for a number of reasons, including: (1) online tobacco sellers purposely try to hide their identities by, for example, using third party processors to front these transactions; (2) once the online sellers are identified by law enforcement they move to another web site; and (3) many of these sales come from foreign countries or from Indian tribes making it difficult to obtain jurisdiction over these individuals.[9] The only way to effectively ensure that tobacco products are not delivered to children is by verifying in person that the addressee is the purchaser and is not a minor. Age

[9] In 2006, the States of California and Maryland attempted to identify online tobacco retailers illegally peddling tobacco products over the Internet. The states obtained address information from the web sites, and sent hundreds of letters to these retailers. Most were returned as undeliverable.

verification procedures such as those contained in Maine's law are necessary to ensure that carriers will not be used as a conduit for illegal activity.

At least 35 states, including Maine, severely restrict Internet sales to consumers.[10] Although states differ in the restrictions they impose, typically they provide that: (1) Retailers at the time of the sale, and/or carriers upon delivery, must verify that the purchaser is an adult; (2) Retailers must be licensed by the state; and (3) Containers

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[10] ALA. CODE § 13A-12-3.5 (Lexis Nexis Supp. 2006); AK. STAT. § 43.50.105 (2006); ARIZ. REV. STAT. ANN. §§ 42-3222 (2006 & Supp. 2006), 42-3225 (2006); CAL. BUS. & PROF. CODE § 22963 (West Supp. 2007); CAL. REV. & TAX. CODE § 30101.7 (West 2004); DEL. CODE. ANN. tit. 30, §§ 5362, 5365 (Supp. 2006); HAW. REV. STAT. ANN. § 245-16 (2006); ID. CODE §§ 39-5714, 39-5715, 39-5717 (Supp. 2007); 720 ILL. COMP. STAT. ANN. 678/5 (West Supp. 2007); IND. CODE ANN. § 24-3-5-5 (West 2006); IA. CODE ANN. § 453A.45 (West 2006); KAN. STAT. ANN. § 79-3333 (Supp. 2006); LA. REV. STAT. ANN. § 47:874 (2006); ME. REV. STAT. ANN. tit. 22, § 1555 C-D (2004); MASS. GEN. LAWS ANN. ch. 64C, § 6 (West 2001 & Supp. 2007); MICH. COMP. LAWS ANN. § 205.431 (West Supp. 2007); MINN. STAT. ANN. §§ 297F.11 (West 1999), § 325F.781 (West Supp. 2007); MO. ANN. STAT. §§ 149.045 (West 2006), § 407.926 (West Supp. 2007); MISS. CODE ANN. § 97-32-5 (West 1999); MONT. CODE ANN. §§ 16-11-104, 16-11-128, 16-11-131 (2005 & Supp. 2006); NEV. REV. STAT. ANN. §§ 370.325, 370.329 (Lexis Nexis 2007); N.J. STAT. ANN. § 54:40A-32 (West 2002); N.C. GEN. STAT. § 105-113.31 (2003); OKLA. STAT. ANN. tit. 68 §§ 304 (West 2001 & Supp. 2007), 309 (West 2001), 317.4 (West Supp. 2007); OR. REV. STAT. § 323.718 (2005); 72 PA. STAT. ANN. § 231-A (West Supp. 2007); R.I. GEN. LAWS § 44-20.1-5 (2005); S.D. CODIFIED LAWS §§ 10-50-93, 10-50-96 (Supp. 2007); TENN. CODE ANN. § 67-4-1029 (2006); TEX. HEALTH & SAFETY CODE ANN. § 161.455 (Vernon Supp. 2006), TEX. TAX CODE ANN. § 154.207 (Vernon 2002); UT. CODE ANN. § 76-10-105.1 (Supp. 2007); VA. CODE ANN. §§ 18.2-246.10 (2004); WASH. REV. CODE ANN. § 70.155.105 (West Supp. 2007); W. VA. CODE ANN. § 16-9E-4 (Lexis Nexis 2006); WIS. STAT. ANN. § 139.345 (West Supp. 2006); WYO. STAT. ANN. § 39-18-106 (2007).

must be labeled as containing cigarettes or tobacco products.

Five states, Connecticut, New York, Maryland, Ohio and Arkansas, have banned outright the shipment and delivery of cigarettes to individual consumers.[11]

If this Court accepts respondent's expansive interpretation of FAAAA preemption, states' tobacco laws will be undercut. Consequently, states may lose their most effective means of preventing children from purchasing tobacco products over the Internet.

B. Congress Intended the FAAAA to Preempt States' Economic Authority Over Motor Carriers, Not State Police Powers

The FAAAA has two preemption provisions. One of these provisions sets forth the following "general rule":

> Except as provided in subparagraph (B), a State . . . may not enact or enforce a law . . . related to a price, route, or services of an air carrier or carrier affiliated with a direct air carrier . . . when such carrier is transporting property by aircraft or by motor vehicle.

49 U.S.C. § 41713(b)(4)(A).

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[11] CONN. GEN. STAT. ANN. § 12-285c (West Supp. 2007); N.Y. PUB. HEALTH LAW § 1399-ll (McKinney 2002); MD. CODE ANN., BUS. REG. §§ 16-222 (2004), 16-223 (2006); OH. REV. CODE ANN. § 2927.023 (Lexis Nexis 2006); ARK. CODE ANN. §§ 26-57-203 (1997 & Supp. 2005), 26-57-215 (1997), 26-57-230 (1997)

The other provision states:

> Except as provided in paragraphs (2) and (3), a State . . . may not enact or enforce a law . . . related to a price, route, or service of any motor carrier (other than a carrier affiliated with a direct air carrier covered by section 41713(b)(4)) . . . with respect to the transportation of property.

49 U.S.C. § 14501(c)(1). The language was patterned after the preemption provision of the Airline Deregulation Act of 1978 (ADA). *See* H.R. Conf. Rep. 103-677 at 85, *reprinted in* 1994 U.S.C.C.A.N. 1715, 1759. Nothing in this language indicates a congressional intent to preempt state police power enactments. To the contrary, the legislative history shows that the FAAAA was intended to preempt states from asserting economic control over carriers in order (1) to eliminate non-uniform "[s]tate economic regulation of motor carrier operations [that] causes significant inefficiencies, increased costs, reduction of competition, inhibition of innovation and technology and curtails the expansion of markets"; and (2) to "level the playing field" between air carriers and motor carriers. H.R. Conf. Rep. No. 103-677, at 85-88 (1994), *reprinted in* 1994 U.S.C.C.A.N. 1715, 1758-60.

That the objectives of FAAAA are consistent with the carriers' goals can be discerned from the testimony of James A. Rogers, Vice President, Government Affairs, United Parcel Service. *State Motor Carrier Laws: Hearing on S. 1491 Before the Subcomm. on Surface Transp. of the H. Comm. on Pub. Works & Transp.*, 103rd Cong. (1994) (statement of James A. Rogers, Vice President, Gov't Affairs United Parcel Service). He testified that he was supporting this legislation because of the decision of the Ninth Circuit Court of Appeals in *Federal Express Corp. v.*

California Public Utilities Commission, 936 F.2d 1075 (9th Cir. 1991). That case held that the Federal Aviation Act, Pub. L. No. 95-504, 92 Stat. 1705, completely preempted the California Public Utilities Commission from any jurisdiction over the activities of Federal Express. As a result, UPS would have to conform to the economic regulations of the state commissions while its direct competitor would not. Mr. Rogers also listed regulations that created substantial economic burdens for UPS including: (1) by requiring carriers to file rate changes with all 38 state commissions; and (2) by making UPS suffer lengthy and costly delays in order to obtain state approval to change a service offering. *State Motor Carrier Laws: Hearing on S. 1491 Before the Subcomm. on Surface Transp. of the H. Comm. on Pub. Works & Transp.*, 103rd Cong. (1994) (statement of James A. Rogers, Vice President, Gov't Affairs United Parcel Service); 1994 WL 377959. It was these substantial economic burdens that caused the carriers to clamor for enactment of the FAAAA. Never did the carriers suggest at the hearings on the FAAAA that they needed protection from state laws restricting the transportation and delivery of dangerous or contraband products like tobacco.

Moreover, the legislative history shows that the conferees, in their 1994 Report to Congress on the FAAAA, determined that nine states did not have the problematic statutes that the FAAAA was intended to preempt because they did not regulate intrastate prices, routes and services of motor carriers. H.R. Conf. Rep. No. 103-677 at 86, *reprinted in* 1994 U.S.C.C.A.N. at 1758. Notably, a number of those pre-1994 statutes had provisions restricting the transportation and delivery of a variety of different products in ways that are very similar to Maine's Tobacco

Delivery Law. Examples of some of those states and their statutes include Arizona (restricting when a common carrier may ship wildlife),[12] Florida (prohibiting a common carrier from knowingly transporting any domestic game unless it is accompanied with the appropriate permit and markings on the package),[13] Maine (requiring common carriers transporting any wild animal or bird to check the hunter's license, affix tags and identification, and make returns to the commissioner),[14] New Jersey (prohibiting common carriers from accepting various beekeeping colonies and supplies without proof of inspection),[15] Vermont (prohibiting common carriers from transporting fish or game protected by law unless accompanied by the required tags),[16] and Wisconsin (prohibiting common carriers from shipping alcohol into the state unless recipient has a proper permit).[17] Under respondent's expansive view of preemption, even these statutes in states that Congress deemed to be in compliance with the FAAAA would be preempted. The conferees implicitly made it clear, using these states as examples, that just because state statutes touch on the transportation and delivery by carriers, or cause carriers to change their uniform practices, does not mean that the statutes are automatically preempted. These statutes pass constitutional muster for the same reason that Maine's tobacco law does – they do not impose the type of significant economic burdens on

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[12] ARIZ. REV. STAT. ANN. § 17-372 (2006).

[13] FLA. STAT. ANN. § 372.16 (West 2006).

[14] ME. REV. STAT. ANN. tit. 12, § 7534 (repealed 2004).

[15] N.J. STAT. ANN. § 4:6-15 (West 1998).

[16] VT. STAT. ANN. tit. 10, § 5102 (2006).

[17] WIS. STAT. ANN. § 125.68 (West 2001 & Supp. 2006).

carrier services that congress intended to prevent when it enacted the FAAAA.

This Court also confirmed Congress's intent not to preempt traditional police-power enactments in a case holding that the FAAAA does not bar a state from delegating to municipalities the state's authority to establish safety regulations governing motor carriers of property. "Congress' clear purpose in § 14501(c)(2)(A) is to ensure that its preemption of States' economic authority over motor carriers of property, § 14501(c)(1), 'not restrict' the preexisting and traditional state police power over safety. . . ." *City of Columbus v. Ours Garage & Wrecker Service, Inc.*, 536 U.S. 424, 439 (2002).

C. If Respondent's View of FAAAA Preemption Were to Become the Law of the Land, State Health and Safety Laws Touching on the Transportation or Delivery of Myriad Dangerous Products Across the Country Would Be at Risk of Preemption

Under respondent's expansive view of FAAAA preemption, every law that mentions the transport and delivery of products by carriers would be preempted. For example, respondent contends that the challenged provisions of Maine's Tobacco Delivery Law are "replete with express references to transportation and delivery services," and are therefore preempted by the FAAAA. According to respondent, these "express references" include the provision in section 1555-D which defines and proscribes the "Illegal Delivery of Tobacco Products" and makes it unlawful for a person to "knowingly transport or cause to be delivered" certain shipments of tobacco products. Resp't's Br. in Opp'n to Writ of Cert. at p. 10. Respondent

erroneously relies on *California Div. of Labor Standards Enforcement v. Dillingham Constr., N.A., Inc.*, 519 U.S. 316, 325 (1997) (a case interpreting a similarly broadly worded provision in the Employee Retirement Income Security Act of 1974 (ERISA), 88 Stat. 829, as amended 29 U.S.C. § 1001 et seq.) to support its mistaken proposition that the provisions of Maine's law "expressly reference" meaning "mention" carrier services and are preempted. Opp'n to Pet. 10. As discussed *infra*, respondent has misconstrued the Court's decision in that case. *Dillingham* rejected a similarly expansive view of preemption in holding that California's prevailing wage law was not preempted by ERISA. *Dillingham*, 519 U.S. at 334.

Respondent's broad view of FAAAA preemption is especially troubling because its reasoning is not limited to tobacco. Under this theory, any state statute – and there are many – that merely mentions carrier transportation and delivery services would be preempted by the FAAAA. Examples of state statutes mentioning such services range from statutes prohibiting the transportation and delivery of dangerous or contraband products outright such as inedible meat,[18] obscene material,[19] plants infested with listed pests,[20] and explosives,[21] to statutes that regulate or restrict the transportation and delivery of raw oysters or shrimp,[22] swine unless certified as free of disease,[23] and

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[18] N.Y. AGRIC. & MKTS. LAW § 96-z-11 (McKinney 2004).

[19] ARIZ. REV. STAT. ANN. § 13-3502 (2001).

[20] CAL. FOOD & AGRIC. CODE § 6461 (West 2001).

[21] COL. REV. STAT. ANN. § 9-6-102 (West 2003).

[22] ALA. CODE § 9-12-50 (Lexis Nexis 2001).

[23] CONN. GEN. STAT. ANN. § 22-319 (West 2001 & Supp. 2007).

beer and wine.[24] As is clear from the legislative history, Congress would not have intended the FAAAA to preempt every state statute that mentions the transportation and delivery of contraband or dangerous products. Such an expansive interpretation of FAAAA preemption would have an enormously adverse effect on the states' health and safety enforcement efforts. In fact, it has the potential to change the entire landscape of regulation of the transportation and delivery of such products by the states. The same mistaken premises the court applied to preempt Maine's tobacco laws might also be applied to invalidate a whole range of state laws essential to health and safety merely because they touch upon transportation or delivery by motor carriers.

II. THE DECISION BELOW CREATES A SUBSTANTIAL UNCERTAINTY REGARDING STATES' ABILITY TO PROSECUTE VIOLATORS OF LAWS REGULATING THE TRANSPORT AND DELIVERY OF TOBACCO PRODUCTS

This Court should reject the flawed analysis proposed by respondent concerning the provision of Maine's law imputing knowledge to carriers that they were delivering contraband tobacco products from the markings or labels on the package. The First Circuit held that Maine's ban on the *knowing* delivery of contraband tobacco is not preempted by the FAAAA, even though it pertains to carrier services, because the provision only requires that the carriers do not act as knowing accomplices in the illegal sale of tobacco products; it does not require carriers to

[24] VA. CODE ANN. § 4.1-209.1 (Supp. 2007).

modify their delivery methods other than by declining to transport products that Maine legitimately bans. *New Hampshire Motor Transport Ass'n v. Rowe*, 448 F.3d 66, 80 (2006). However, respondent contends that the First Circuit's determination that the provision imputing knowledge of illegal activity to the carrier is preempted because that provision would impact the operations of the carrier by requiring reading and comprehending the labels and markings is correct.

If this Court were to decide this case as respondent suggests, such a decision would create uncertainty about the states' Internet tobacco-sales laws, and leaves states in a quandary about which laws will pass constitutional muster and which will not. Such uncertainty puts at risk the states' ability to successfully prosecute sellers of contraband tobacco over the Internet. For example, California has two laws regulating non-face-to-face tobacco sales – California Business & Professions Code § 22963 and California Revenue & Taxation Code § 30101.7. Although section 22963 primarily regulates the conduct of retailers, the statute does provide for an enforcement mechanism against carriers, if they deliver tobacco products with reason to know the package's contents.[25] Section

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[25] Section 22963(d) states:

> For the purposes of enforcement of this section pursuant to Section 22958, the acts of the United States Postal Service or other common carrier when engaged in the business of transporting and delivering packages for others . . . who transports or delivers a package for another person *without any reason to know of the package's contents*, are not unlawful and are not subject to civil penalties. Section 22963, subd. (d); (italics added).

30101.7 requires the retailer to, among other things, label the package as containing cigarettes.

To enforce a ban on the *knowing* delivery of cigarettes, the state must put into evidence the package delivered by the carrier labeled "cigarettes," so that the fact finder can determine if the carrier had reason to know the package contained cigarettes. According to respondent, however, even if the state could impute such knowledge to the carrier this fact could not be introduced into evidence. As a result, the carrier would be immunized from the consequences of its illegal act. It is unthinkable that states can enact laws to protect the public health of their citizens but are deprived of the most effective tools to enforce those statutes.

Respondent's analysis is also flawed as to laws that ban the transport or delivery of contraband products outright. The court held that the knowing delivery of contraband tobacco products is not preempted by the FAAAA, because carriers need not modify their delivery methods other than by declining to transport a product the state has legitimately banned. (*Rowe*, 448 F.3d 66, 80.) As a practical matter, as with the California statute and five statutes banning the direct delivery of cigarettes or tobacco products to consumers, the way to prove a *knowing* delivery of contraband tobacco products by the carrier is also to impute knowledge if the package was labeled "cigarettes" or "tobacco" and by the fact that the cigarettes were delivered to a consumer as opposed to one of the excepted persons – e.g. a state-licensed tobacco distributor or retailer set forth in the statute.

This Court should reject respondent's contention that violation of Maine's statute cannot be imputed to a carrier.

To hold otherwise would effectively leave states that ban outright the delivery of tobacco products no way to enforce their statutes in practical terms. Simply put, under respondent's analysis even statutes banning the *knowing* delivery of contraband tobacco may be unenforceable in application, unless the basis of the knowing violation is that the carrier was specifically told the package contained tobacco products and despite that knowledge, delivered them anyway – an unlikely scenario.

III. RATHER THAN THE BROAD PREEMPTION STANDARD APPLIED BY THE FIRST CIRCUIT IN RELIANCE ON *MORALES*, THE APPROPRIATE STANDARD IS THAT ADOPTED BY THIS COURT IN THE ERISA CASES

This Court should apply a narrow view of preemption in this case as it has done in cases decided since *Morales v. Trans' World Airlines Inc.*, including *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645 (1995) and *California Div. of Labor Standards Enforcement v. Dillingham Construction, Inc.*, 519 U.S. 316 (1997). In those cases this Court was grappling with the problem of where to draw the line in a similar seemingly limitless preemption provision in the Employee Retirement Income Security Act of 1974 (ERISA) which preempts state laws "insofar as they . . . relate to any employee benefit plan. . . ." 29 U.S.C. § 1144(a) (2000).

In *Travelers*, this Court rejected the opportunity to extend a broad preemption analysis to ERISA. There commercial insurers challenged a New York statute requiring hospitals to collect surcharges from patients covered by

a commercial insurance carrier but not from patients insured by a Blue Cross/Blue Shield Plan, and imposing certain surcharges that vary with the number of Medicaid recipients they enroll. The issue was whether ERISA preempted the state surcharge provisions on bills of patients whose commercial insurance is purchased by employee health care plans governed by ERISA and Health Maintenance Organizations whose membership fees are paid by an ERISA plan. Petitioners claimed that the statute "related to" employee benefit plans within the meaning of ERISA and was preempted. Finding the broad language of ERISA unhelpful in determining whether the state statute was preempted, the Court said:

> . . . one might be excused for wondering at first blush, whether the words of limitation ("insofar as they . . . relate") do much limiting. If "relate to" were taken to extend to the furthest stretch of its indeterminacy, then for all practical purposes pre-emption would never run its course . . .

Travelers at 655.

A unanimous Court in *Travelers* read the *Morales* ruling narrowly, and rejected the claim because the surcharges are not imposed exclusively on ERISA plans, but are imposed regardless of whether commercial coverage, or membership is secured by an ERISA plan, private purchase or otherwise. *Id.* at 655. Traditional state regulation having no more than an *indirect effect* on ERISA plans is not "related to" such plans within the meaning of ERISA's preemption clause. *See id.* at 661-62.

In determining whether the surcharge laws have a "connection with" ERISA plans this Court said it was necessary to go beyond the unhelpful text and look instead

to "the objectives of the ERISA statute as a guide to the scope of the state law that Congress understood would survive" *Id.* at 656. Unlike the First Circuit below, this Court "[has] never assumed lightly that Congress has derogated state regulation, but instead have addressed claims of pre-emption starting with the presumption that Congress does not intend to supplant state law" *Id.* at 654

Although the ERISA preemption provision is broad, "nothing in the language of the Act or the context of its passage indicates that Congress chose to displace general health care regulation, which historically has been a matter of local concern." *Id.* at 661. This Court found that neither the purpose of the statute nor the effect on ERISA plans justify preemption.

Similarly, in *Dillingham*, this Court held that California's prevailing wage law (CPWL) did not "relate to" employee benefit plans and was not preempted by ERISA. California's law required contractors on public works projects to pay workers the prevailing wage in the worker's locale, except that a lower wage could be paid for workers in apprenticeship programs. *Dillingham* says that since ERISA's enactment, the Court has endeavored with some regularity to interpret and apply the "unhelpful text" of ERISA's pre-emption provision. It has also long acknowledged that ERISA's preemption provision is "clearly expansive," has a "broad scope," and is "conspicuous for its breadth." *Dillingham*, 519 U.S. at 324. The Court's efforts in *Dillingham* at applying the provision has yielded a two-part inquiry: a "law 'relate[s] to' a covered employee benefit plan for purposes of [ERISA] 'if it [1] has a connection with or [2] reference to such a plan.'" (cites omitted) *Id.* "Where a State's law acts immediately and exclusively upon ERISA plans, . . . or where the existence of ERISA

plans is essential to the law's operation, . . . that 'reference' will result in pre-emption." *Id.* at 325.

The Court in *Dillingham* found that the prevailing wage statute, like the New York surcharge law has a tenuous economic effect on ERISA plans. The Court went on to say that while these laws alter the incentives, they do not dictate the choices facing ERISA plans and "[i]n this regard, it is no different from myriad state laws in areas traditionally subject to local regulation, which Congress could not possibly have intended to eliminate." *Dillingham*, 519 U.S. at 334.

Similarly, in this case, neither Maine, nor the 34 states restricting Internet tobacco sales to consumers, are forcing carriers to deliver tobacco products. The states are merely granting the power (or creating the incentive) to the carriers to expand their delivery business to include tobacco products, as long as they comply with Maine's statutory requirements. Five states currently ban the direct shipment of tobacco by retailers to consumers, and Maine and the rest of the 34 states that restrict Internet tobacco sales could do so as well. Given that states like Maine that restrict Internet tobacco sales have the greater power to ban the shipments altogether, it makes no sense to say they do not have the lesser power to condition such a shipment on a mode of delivery. Maine's Tobacco Delivery Law is no different from myriad state laws regulating the transportation and delivery of dangerous products which Congress could not possibly have intended to eliminate.

Moreover, neither Maine's Tobacco Delivery Law nor similar laws in other states have a connection with, or reference to carrier services as interpreted by this Court in

Dillingham and *Travelers*. Under the *Dillingham* test, neither section 1555-C(3)(C) nor other similar state statutes imposing age-verification obligations on retailers, "reference" carrier services for two reasons: (1) by their terms these laws apply to delivery services that are not covered by the FAAAA, including the United States Postal Service, so they do not act *exclusively* on carrier services, and (2) the provisions obligate *retailers*, not carriers, so they do not act *immediately* on carrier services. Seventeen states[26] in addition to Maine do not impose age-verification requirements directly on the carrier. Either they impose obligations on the retailer or the statutes apply generally "merely mentioning" carrier services. Under respondent's limitless view, all these statutes "expressly reference" carrier services and should be preempted. But Congress could not have intended such a massive across-the-board preemption of all those state statutes.

Likewise, neither Maine's law nor other states' laws restricting delivery of tobacco and other dangerous products have a forbidden significant effect on carrier services.

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[26] ARIZ. REV. STAT. ANN. §§ 42-3222 (2006 & Supp. 2006), 42-3225 (2006); DEL. CODE ANN. tit. 30, §§ 5362, 5365 (Supp. 2006); IND. CODE ANN. § 24-3-5-5 (West 2006); LA. REV. STAT. ANN. § 47:874 (2006); MINN. STAT. ANN. § 325F.781 (West Supp. 2007); NEV. REV. STAT. ANN. §§ 370.325, 370.329 (Lexis Nexis 2007); OKLA. STAT. ANN. tit. 68 § 317.4 (West Supp. 2007); OR. REV. STAT. § 323.718 (2005); 72 PA. STAT. ANN. § 231-A (West Supp. 2007); R.I. GEN. LAWS § 44-20.1-5 (2005); S.D. CODIFIED LAWS §§ 10-50-93, 10-50-96 (Supp. 2007); TENN. CODE ANN. § 67-4-1029 (2006); TEX. HEALTH & SAFETY CODE ANN. § 161.455 (Vernon Supp. 2006); UT. CODE ANN. § 76-10-105.1 (Supp. 2007); VA. CODE ANN. § 18.2-246.10 (2004); WASH. REV. CODE ANN. § 70.155.105 (West Supp. 2007); W. VA. CODE ANN. § 16-9E-4 (Lexis Nexis 2006).

Twenty-six states, in addition to Maine, require tobacco products to be labeled as such.[27] At least six states, in addition to Maine, require delivery to a licensed entity.[28]

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[27] ALA. CODE § 13A-12-3.5 (Lexis Nexis Supp. 2006).
CONN. GEN. STAT. ANN. § 12-285c (West Supp. 2007).
N.Y. PUB. HEALTH LAW § 1399-ll (McKinney 2002).
AK. STAT. § 43.50.105 (2006).
ARIZ. REV. STAT. ANN. §§ 42-3222 (2006 & Supp. 2006), 42-3225 (2006).
CAL. REV. & TAX. CODE § 30101.7 (West 2004).
DEL. CODE. ANN. tit. 30, §§ 5362, 5365 (Supp. 2006).
HAW. REV. STAT. ANN. § 245-16 (2006).
ID. CODE §§ 39-5714, 39-5715, 39-5717 (Supp. 2007).
720 ILL. COMP. STAT. ANN. 678/5 (West Supp. 2007).
IND. CODE ANN. § 24-3-5-5 (West 2006).
KAN. STAT. ANN. § 79-3333 (Supp. 2006).
LA. REV. STAT. ANN. § 47:874 (2006).
MICH. COMP. LAWS ANN. § 205.431 (West Supp. 2007).
MINN. STAT. ANN. § 325F.781 (West Supp. 2007).
NEV. REV. STAT. § 202.24935 (2005).
NEV. REV. STAT. ANN. §§ 370.325, 370.329 (Lexis Nexis 2007).
OKLA. STAT. ANN. tit. 68 § 317.4 (West Supp. 2007).
OR. REV. STAT. § 323.718 (2005).
R.I. GEN. LAWS § 44-20.1-5 (2005).
S.D. CODIFIED LAWS §§ 10-50-93, 10-50-96 (Supp. 2007).
TENN. CODE ANN. § 67-4-1029 (2006).
TEX. HEALTH & SAFETY CODE ANN. § 161.455 (Vernon Supp. 2006).
VA. CODE ANN. § 18.2-246.10 (2004).
WASH. REV. CODE ANN. § 70.155.105 (West Supp. 2007).
W. VA. CODE ANN. § 16-9E-4 (Lexis Nexis 2006).

[28] MD. CODE ANN., BUS. REG. § 16-222 (2004).
N.Y. PUB. HEALTH LAW § 1399-ll (McKinney 2002).
HAW. REV. STAT. ANN. § 245-16 (2006).
OH. REV. CODE ANN. § 2927.023 (Lexis Nexis 2006).

(Continued on following page)

Reading labels, reviewing a list of unlicenced tobacco retailers and complying with age-verification requirements has a tenuous effect on carrier services. Clearly such minor inconveniences are not the type of significant economic effect Congress intended when it enacted the FAAAA, and respondent has not introduced any evidence to the contrary. If respondent's limitless view of preemption is accepted by this Court, all of the state statutes are at risk of preemption.

As noted above, UPS and other major carriers are already doing what is basically required by Maine's law and the laws of a number of other states, at least with regard to cigarettes, and since UPS already has a database of tobacco retailers, finding out information about retailers selling other tobacco products should not be too difficult. The objective of Maine's Tobacco Delivery Law, and laws regulating tobacco and other dangerous products in other states, is to ensure that (1) products such as tobacco are not delivered to children and/or (2) the carrier is not the illegal conduit for such activities. Congress's in enacting the FAAAA did not intend to preempt public health laws having an indirect or remote impact on carrier services; nor did Congress intend to create a loophole that would immunize carriers from illegal activity.

In rejecting the narrow approach to preemption taken by this Court in *Dillingham* and *Travelers* in favor of the limitless view of preemption set forth in *Morales*, the First Circuit said that "[I]f developments in pension law have under-cut holdings in air transportation law, it is for the

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AK. STAT. § 43.50.105 (2006).

720 ILL. COMP. STAT. ANN. 678/5 (West Supp. 2007).

Supreme Court itself to make the adjustments." 448 F.3d at 76. The amici states ask this court to do just that – clarify that the narrow standard of preemption set forth in *Dillingham* and *Travelers* is the appropriate test for interpreting the FAAAA preemption provision and that Maine's Tobacco Delivery Law is not preempted by the FAAAA.

CONCLUSION

The judgment of the court of appeals should be reversed.

Dated: August 23, 2007

Respectfully submitted,

EDMUND G. BROWN JR.
Attorney General of the State
of California

TOM GREENE
Chief Assistant Attorney General

MANUEL MEDERIOS
Solicitor General

DENNIS ECKHART
Senior Assistant Attorney General

LAURA KAPLAN
Deputy Attorney General
Counsel of Record

Counsel for Amicus Curiae

10/11/07

(17)

No. 06-457

In The
Supreme Court of the United States

G. STEVEN ROWE, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF THE STATE OF MAINE,
Petitioner,

v.

NEW HAMPSHIRE MOTOR TRANSPORT ASSOCIATION, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF *AMICI CURIAE* OF FEDERAL EXPRESS CORPORATION AND THE AIR TRANSPORT ASSOCIATION OF AMERICA, INC., IN SUPPORT OF RESPONDENTS

ROBERT K. SPOTSWOOD
Counsel of Record
KENNETH D. SANSOM
EMILY J. TIDMORE
SPOTSWOOD SANSOM & SANSBURY LLC
940 CONCORD CENTER
2100 THIRD AVE. NORTH
BIRMINGHAM, AL 35203
(205) 986-3620

Counsel for Amici Curiae
Federal Express Corporation and the Air Transport Ass'n of America, Inc.

CONNIE LEWIS LENSING
R. JEFFERY KELSEY
FEDERAL EXPRESS CORPORATION
LEGAL DEPARTMENT, LITIGATION
3620 HACKS CROSS ROAD
THIRD FLOOR, BUILDING B
MEMPHIS, TN 38125
(901) 434-8432

Counsel for Amicus Curiae
Federal Express Corporation

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

QUESTION PRESENTED

Whether provisions of the Maine Tobacco Delivery Law that regulate whether and how cargo carriers may provide transportation and delivery services for shipments of tobacco products are "law[s] related to a price, route, or service" of such carriers and, therefore, are preempted by the Federal Aviation Administration Authorization Act of 1994 ("FAAAA"), 49 U.S.C §§ 14501(c) & 41713(b)(4)(A).

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INTEREST OF *AMICI CURIAE* FEDERAL EXPRESS CORPORATION AND THE AIR TRANSPORT ASSOCIATION OF AMERICA, INC.[1]

Federal Express Corporation, which does business as FedEx Express ("FedEx Express"), is a federally certified, all-cargo air carrier that delivers packages and other cargo in all fifty states and throughout the world. *See Federal Express Corp. v. Cal. Pub. Util. Comm'n*, 936 F.2d 1075, 1076 (9th Cir. 1991). FedEx Express filed an *amicus* brief in support of Respondents in the court below.

FedEx Express is now joined as *amicus curiae* by the Air Transport Association of America, Inc. (the "Airline Association"), an association of eighteen U.S. cargo and passenger airlines and three foreign airlines. The Airline Association's domestic airline members are: ABX Air; Alaska Airlines; Aloha Airlines; American Airlines; ASTAR Air Cargo; Atlas Air; Continental Airlines; Delta Air Lines; Evergreen International Airlines; FedEx Express; Hawaiian Airlines; JetBlue Airways; Midwest Airlines; Northwest Airlines; Southwest Airlines; United Airlines; UPS Airlines; and US Airways. These air carriers operate within the United States, as well as between the United States and foreign countries. The Airline Association's foreign airline members are: Air

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[1] The parties have consented in writing to the filing of this brief, which was authored in its entirety by counsel for *amici curiae*. No person or entity other than *amici curiae* made a monetary contribution to the preparation or submission of this brief.

Canada, Air Jamaica, and Mexicana. These foreign air carriers operate between the United States and foreign countries and are subject to suit in the United States. A principal purpose of the Airline Association is to support its air carrier members by promoting the cost-effective delivery of air transportation services and advocating common industry positions on important policy and legal issues. Since its inception in 1936, through both regulated and deregulated eras, the Airline Association has been involved in the development of the law governing the carriage of goods and passengers by air.

A central feature of the law governing FedEx Express and the other members of the Airline Association is the Airline Deregulation Act of 1978 ("ADA"), Pub. L. No. 95-504, 92 Stat. 1705 (1978), which has long prevented air carriers from being subject to a complicated patchwork of state regulations by prohibiting states from enacting or enforcing laws or regulations "related to" the prices, routes, or services of an air carrier. *Id.* § 4(a), 92 Stat. at 1708 (currently codified at 49 U.S.C. § 41713(b)(1)). The subsequently enacted Federal Aviation Administration Authorization Act of 1994 ("FAAAA"), Pub. L. No. 103-305, 108 Stat. 1569 (1994), which is at issue in this case, contains preemptive language that is both identical to preemptive language in the ADA and further addresses preemption with regard to air carrier transportation of property. *Id.* tit. VI, § 601(b)–(c), 108 Stat. at 1605–06 (currently codified at 49 U.S.C. §§ 14501(c)(1), 41713(b)(4)(A)). FedEx Express and the Airline Association therefore have an interest in this case because the Court's decision will affect the preemptive scope of the ADA and the FAAAA.

SUMMARY OF THE ARGUMENT

The FAAAA, which applies to motor and other carriers, and the ADA, which applies to air carriers, share identical preemptive language and common deregulatory purposes. The resulting interrelationship between these two statutes therefore plays a vital role in the Court's decision of this case, which will impact air carriers as well as motor carriers. Because the FAAAA and the ADA share identical preemptive language, the Court's decision regarding whether the FAAAA preempts the challenged sections of Maine's Tobacco Delivery Law will apply with equal force to any Airline Association members that qualify as "delivery services" under Maine's law. Moreover, the effects of the Court's decision would be even more far-reaching if it were to accept petitioner's invitation to revisit its established interpretation of the preemptory language contained in the ADA and the FAAAA. Such a reexamination would introduce uncertainty into the expansive body of ADA-preemption law that has developed in accordance with this Court's precedent and on which air carriers, including FedEx Express and the other members of the Airline Association, rely. It is, therefore, both unwise and unwarranted.

The interrelationship between the FAAAA and the ADA not only magnifies the implications of the Court's decision in this case, but also shapes its substantive resolution. Because Congress intended for the FAAAA and the ADA to have the same preemptive effect, what is true of the ADA should be true of the FAAAA as well. State laws like Sections 1555-C(3)(C) and 1555-D contribute to the type of patchwork that Congress sought to prevent by enacting the ADA. A

finding that such laws are preempted therefore fulfills Congress' purpose for both the ADA and the FAAAA. Likewise, because this Court's precedent shows that no presumption against preemption by the ADA would apply in this context, no presumption against preemption by the FAAAA applies. Yet even if such a presumption were to apply, the plain language of the ADA would overcome it. Because Sections 1555-C(3)(C) and 1555-D "relate to" the services of air and motor carriers, they fall within the express preemptory language of both the ADA and the FAAAA.

Accordingly, this Court should affirm the First Circuit's holding that the FAAAA preempts Sections 1555-C(3)(C) and 1555-D of Maine's Tobacco Delivery Law. By so ruling, this Court will not only fulfill Congress' intent for the FAAAA, but also will reaffirm the nationally uniform rules governing interstate transportation by air that Congress envisioned, that the lower courts developed in reliance on this Court's precedent, and on which air carriers routinely rely.

ARGUMENT

I. THE COURT SHOULD DECIDE THIS CASE WITH DUE CONSIDERATION OF THE IMPACT THAT ITS INTERPRETATION OF PREEMPTIVE LANGUAGE THAT APPLIES EQUALLY TO AIR CARRIERS WILL HAVE ON AIRLINE OPERATIONS AND THE LAW GOVERNING AIRLINES.

The Court should be cognizant of the impact its decision in this case will have on air carriers and the

law governing their operations. Preemptive language in the Federal Aviation Administration Authorization Act of 1994 ("FAAAA"), currently codified at 49 U.S.C. §§ 14501(c)(1), 41713(b)(4)(A), is the same as that of the Airline Deregulation Act ("ADA"), currently codified at 49 U.S.C. § 41713(b)(1), upon which FedEx Express and the other members of the Airline Association rely.[3] This Court's determination of whether the FAAAA preempts the challenged portions of Maine's Tobacco Delivery Law, Me. Rev. Stat. Ann. tit. 22, §§ 1555-C(3)(C) and 1555-D, will therefore apply with equal force to any members of the Airline Association that qualify as "delivery services" under Maine's law. Moreover, the phrase "related to a price, route, or service" in the ADA has a settled meaning around which the current landscape of air carriage law has developed. Any change to the understanding of that phrase in the context of the FAAAA will result in a corresponding change to the ADA, which will disrupt the established body of law under which FedEx Express and the other members of the Airline Association operate.

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[3] The ADA's preemption clause was originally codified at 49 U.S.C. App. § 1305(a)(1). It was recodified at its current location, with only technical changes that Congress intended to have no substantive effect, in 1994. *See American Airlines, Inc. v. Wolens*, 513 U.S. 219, 222–23 & n.1 (1995).

A. Because the ADA and the FAAAA share identical preemptive language, the Court's decision regarding whether the FAAAA preempts Sections 1555-C(3)(C) and 1555-D will also determine whether the ADA preempts those statutes.

The Court's decision in this case will directly affect air carriers who qualify as "delivery services" under Maine's law because the FAAAA, which applies to air carriers as well as motor carriers and intermodal carriers, has preemptive language identical to that of the ADA, which applies specifically to air carriers. The ADA preempts any "law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier," 49 U.S.C. § 41713(b)(1), while the FAAAA preempts, in relevant part, any "law, regulation, or other provision having the force and effect of law related to a price, route, or service of any motor carrier," *id.* § 14501(c)(1), or "air carrier or carrier affiliated with a direct air carrier through common controlling ownership," *id.* § 41713(b)(4)(A) (hereinafter an "intermodal carrier").

More importantly, Congress has made clear its intent that the FAAAA and the ADA have equal preemptive effect. One of Congress' primary purposes for enacting the FAAAA was to place motor and intermodal carriers on equal footing with airlines. Congress had established broad preemption of state laws "related to a price, route or service of an air carrier" in 1978, when it deregulated the airline industry by passing the ADA. *See Morales v. Trans World Airlines*, 504 U.S. 374, 378–79 (1992). Before the passage of the FAAAA, however, there was no such

preemption for motor carriers. By 1994, Congress recognized that state regulation of motor carriers not only "impose[d] an unreasonable burden on interstate commerce," "impede[d] the free flow of trade, traffic, and transportation of interstate commerce," and "place[d] an unreasonable cost on the American consumers," Pub. L. No. 103-305, tit. VI, § 601(a)(1), 108 Stat. 1569, 1605 (1994), but also resulted in an uneven playing field between air carriers, who had the benefit of a single federal regulatory scheme, and motor and intermodal carriers, who did not.

Thus, Congress included in the FAAAA preemptive language essentially identical to the language included in the ADA, noting that "[t]he central purpose of this legislation is to extend to all affected carriers, air carriers and carriers affiliated with direct air carriers through common controlling ownership on the one hand and motor carriers on the other, the identical intrastate preemption of prices, routes, and services as that originally contained in" the ADA. H.R. Rep. No. 103-677 at 84 (1994) (Conf. Rep.), *as reprinted in* 1994 U.S.C.C.A.N. 1715, 1755; *see also id.* at 85, *as reprinted in* 1994 U.S.C.C.A.N. at 1757 (the FAAAA's preemption provision for motor carriers "is identical to the preemption provision deregulating air carriers . . . and is intended to function in the exact same manner with respect to its preemptive effects"); *id.* at 82–83, *as reprinted in* 1994 U.S.C.C.A.N. at 1754 (the FAAAA's preemption provision for intermodal carriers is intended to preempt state regulation "in an identical manner to the preemption provision passed

in 1978 contained in" the ADA).[3] Furthermore, Congress specifically intended that both the FAAAA and the ADA be given the expansive interpretation this Court applied to the ADA in *Morales v. Trans World Airlines, Inc.* *See id.* at 83, *as reprinted in* 1994 U.S.C.C.A.N. at 1755 ("[T]he conferees do not intend to alter the broad preemption interpretation adopted by the United States Supreme Court in *Morales*. . . .").

Because Congress intended the preemption provisions of the FAAAA and the ADA to have equal effect, those provisions have been construed identically. The ADA therefore preempts Sections 1555-C(3)(C) and 1555-D to the same extent that the FAAAA preempts those statutes, and vice versa. Cases interpreting one statute's preemption provisions apply with equal force to the preemption provisions of the other statute. *See, e.g., N.H. Motor Transp. Ass'n v. Rowe*, 448 F.3d 66, 75 (1st Cir. 2006) ("[I]n addition to cases interpreting the FAAAA, we look to cases interpreting the Airline Deregulation Act."); *Deershin Trading Post, Inc. v. United Parcel Serv. of Am., Inc.*, 972 F. Supp. 665, 668 (N.D. Ga. 1997) ("[I]n interpreting the preemption provisions of the FAAAA,

[3] This uniformity between the ADA and the FAAAA is crucial to ensuring a seamless system of transportation in today's world, where cargo entrusted to an air carrier may be transported "intermodally" by fluctuating combinations of truck, passenger aircraft, and/or freighter aircraft, depending on factors like the size of the cargo, the day of the week, the time of day the cargo was tendered to the carrier, security concerns, delivery requirements, or unanticipated events like bad weather or mechanical breakdowns.

the Court is guided by cases interpreting the preemption provision of the ADA."). As a result, the Court's decision in this case regarding the FAAAA's preemption of Sections 1555-C(3)(C) and 1555-D will also determine the extent to which Maine's laws, as applied to any air carriers that qualify as "delivery services" under Maine's definition, are preempted by the ADA.

B. Because the ADA and the FAAAA share identical preemptive language, a change in the interpretation of that language in the context of the FAAAA will also alter the established meaning of that language in the context of the ADA, on which air carriers substantially rely.

Since this Court's decisions in *Morales*, 504 U.S. 374, and *American Airlines v. Wolens*, 513 U.S. 219 (1995), a well-defined body of law governing air carriage has developed in the lower courts. Together, these many decisions form a nearly comprehensive outline of the scope of ADA preemption, on which air carriers and parties dealing with air carriers can ground their expectations. And underlying all of these decisions are the cornerstones of *Morales* and *Wolens*. In the course of deciding whether Sections 1555-C(3)(C) and 1555-D are preempted, therefore, this Court should reject the invitation of petitioner and its *amici* States to revisit the *Morales* and *Wolens* standard in favor of later developments in ERISA cases. *See* Pet. Br. 29; States' *Amici* Br. 22; Cert. Pet. 26–27 (citing two lower court decisions drawing on aspects of ERISA preemption analysis to decide an

FAAAA preemption question). Such a departure from the standard established by this Court in *Morales* and *Wolens* would not only violate Congress' intent that the *Morales* standard apply, but would also cause upheaval in this well-settled area of the law, leading to questions about the continued viability of the lines that have already been drawn, upsetting the legitimate expectations of air carriers and those who deal with air carriers, and, accordingly, modifying the perceptions of risk underlying current airline price structures.

In *Morales*, this Court recognized the expansive scope of preemption under the ADA. The preemptive language used by Congress in the ADA, this Court held, "express[es] a broad pre-emptive purpose," has a "broad scope" and "expansive sweep," and is both "deliberately expansive" and "conspicuous for its breadth." *Morales*, 504 U.S. at 383–84. Given this expansive language, the Court rejected the suggestion that the ADA prevents states only from "actually prescribing rates, routes, or services"; applies only to laws specifically addressed to the airline industry; or preempts only state laws that are inconsistent with federal laws. *Id.* at 385–86. Instead, this Court held in *Morales* that the ADA preempts *any* state law having a connection with or reference to an airline's rates, routes or services, unless that connection or reference is "too tenuous, remote, or peripheral . . . to have preemptive effect." *Id.* at 390.[4]

[4] Although the Court mentioned this limited exception, it "express[ed] no views about where it would be appropriate to draw th[at] line." *Morales*, 504 U.S. at 390.

Two years later, Congress codified the *Morales* decision when it reenacted Title 49 of the U.S. Code in 1994. Although it made technical amendments to the ADA's preemption provision, Congress stated that it intended no substantive change in the statute. *See* Pub. L. 103-272, § 1(a), 108 Stat. 745 (1994). By reenacting the ADA without change, Congress made the broad preemption interpretation that this Court had established in *Morales* part of the statute. *See Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 382 n.66 (1982) ("Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change."); *see also Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 770 n.4 (2004).[5]

The following year, in *Wolens*, this Court reaffirmed the far-reaching scope of ADA preemption. In *Wolens*, the Illinois Supreme Court had held that general state consumer protection laws, which affected "unessential" matters like frequent flier programs, have too tenuous an effect on airline prices, routes, or services to be preempted. This Court rejected that holding, concluding that even state laws of general applicability affecting "non-essential" airline matters—such as frequent flier programs—are sufficiently "related to"

[5] Congress also specifically indicated its intention that the *Morales* standard apply to the FAAAA. *See* H.R. Rep. No. 103-677, at 83 (1994) (Conf. Rep.), *as reprinted in* 1994 U.S.C.C.A.N. 1715, 1755 ("[T]he conferees do not intend to alter the broad preemption interpretation adopted by the United States Supreme Court in *Morales*. . . .").

air carriers' prices, routes and services as to be preempted by the ADA. *Wolens*, 513 U.S. at 226–28. The Court also held that the ADA prevents states not only from enacting statutes or enforcing state common law in a way affecting an air carrier's prices, routes, or services, but also from enforcing, in breach of contract actions, anything other than the specific terms agreed on by the parties. *Id.* at 232–33 (the ADA "confines courts, in breach-of-contract actions, to the parties' bargain, with no enlargement or enhancement based on state laws or policies external to the agreement"). In sum, this Court held, states "may not seek to impose their own public policies or theories of competition or regulation on the operations of an air carrier," whether by statute or common law or equitable contract doctrines. *Id.*

Since *Morales* and *Wolens*, an expansive body of law has been built in the lower courts, lawsuit by lawsuit, on the foundation laid by this Court in those cases. This legal framework, which defines which claims are not allowed in litigation involving air carriers, provides the structure around which FedEx Express and the other members of the Airline Association order their relationships, including relationships with each other, with customers, with vendors, and with employees. The American Law Report on ADA preemption demonstrates the comprehensiveness of these cases. *See* Ann K. Wooster, *Construction and Application of § 105 Airline Deregulation Act (49 U.S.C.A. 41713), Pertaining to Preemption of Authority over Prices, Routes, and Services*, 149 A.L.R. Fed. 299 (1998) (hereinafter "the ALR"). The ALR cites over 170 cases addressing the scope of ADA preemption since this Court's decisions

in *Morales* and/or *Wolens*. *See id.* Those cases analyze ADA preemption in the context of 34 different state law causes of action, including, among others, antitrust, interference with contractual relations, products liability, and fraud; in the context of 9 types of state laws, rules, and regulations on various topics, including air ambulance service, airport security, deceptive practices, and noise and environmental issues; and in the context of several other state law issues, including the availability of punitive damages, the application of various common-law doctrines, and the availability of other miscellaneous causes of action. *See id.*

Moreover, courts have addressed ADA preemption in cases involving a variety of different parties: passengers suing passenger airlines, *see, e.g.*, *Smith v. Comair, Inc.*, 134 F.3d 254, 256 (4th Cir. 1998); shippers suing cargo airlines, *see, e.g.*, *Read-Rite Corp. v. Burlington Air Express, Ltd.*, 186 F.3d 1190, 1193 (9th Cir. 1999); employees suing airlines as employers, *see, e.g.*, *Botz v. Omni Air Int'l*, 286 F.3d 488, 492–97 (8th Cir. 2002); vendors suing airlines, *see, e.g.*, *Lyn-Lea Travel Corp. v. American Airlines, Inc.*, 283 F.3d 282, 288 (5th Cir. 2002) (travel agent); airlines suing airlines, *see, e.g.*, *United Airlines, Inc. v. Mesa Airlines, Inc.*, 219 F.3d 605, 606–07 (7th Cir. 2000); and even non-airlines suing non-airlines, *see, e.g.*, *Lyn-Lea Travel Corp.*, 283 F.3d at 287 n.8 (travel agent suing non-air-carrier subsidiary); *Huntleigh Corp. v. Louisiana State Bd. of Private Sec. Examiners*, 906 F. Supp. 357, 362 (M.D. La. 1995) (corporation providing pre-departure screening at airports suing state board of security examiners); *Marlow v. AMR Servs. Corp.*,

870 F. Supp. 295, 297–98 (D. Hawaii 1994) (employee suing jetbridge maintenance company).

This extensive body of law, which guides air carriers and those who deal with air carriers as they navigate the channels of ADA preemption, is drawn on this Court's decisions in *Morales* and *Wolens*. This Court should, therefore, reject Petitioner's invitation to import developments in ERISA law into this context contrary to Congress' intent and, instead, should reaffirm the broad preemption interpretation that it has already established, Congress has adopted, and on which air carriers have relied.

II. BECAUSE THE ADA AND THE FAAAA SHARE IDENTICAL PREEMPTIVE LANGUAGE, THE COURT SHOULD ADDRESS FAAAA PREEMPTION OF THE MAINE STATUTES WITH AN EYE TOWARD PRECLUDING THE TYPE OF PATCHWORK REGULATION OF AIR CARRIERS THAT THE ADA WAS ENACTED TO PREVENT.

In 1978, Congress released the air transportation industry from intensive federal regulation because it determined that such deregulation would best further "efficiency, innovation, and low prices," as well as "variety [and] quality . . . of air transportation services." 49 U.S.C. § 40101(a). Congress recognized, however, that the states could easily undo its deregulation efforts by enacting their own regulations governing air carriers. *See Morales*, 504 U.S. at 378. With fifty states in the union, plus the District of Columbia, airlines could be subjected to fifty-one

regulatory schemes, each with its own obligations and prohibitions. The resulting patchwork of state laws would utterly defeat Congress' goal of deregulating air carriers. Congress, unwilling to permit this evisceration of its efforts, resolved the problem by including a broad preemption clause in the ADA. *Morales*, 504 U.S. at 378–79 ("To ensure that the States would not undo federal deregulation with regulation of their own, the ADA included a pre-emption provision . . . ."). As Congress recognized when it finally extended ADA-type preemption to motor and intermodal carriers through the FAAAA, the purpose of this "deliberately expansive" preemption clause, *id.* at 384, was to protect air carriers from having to contend with a "patchwork" of state regulations. *See* H.R. Rep. No. 103-677, at 87 (1994) (Conf. Rep.), *as reprinted in* 1994 U.S.C.C.A.N. 1715, 1759; *see also id.* ("The sheer diversity of these [state] regulatory schemes is a huge problem for national and regional carriers attempting to conduct a standard way of doing business.").

Congress' purpose in relieving air carriers from piecemeal state re-regulation will not be fulfilled, however, if the FAAAA (and, thus, the ADA) do not preempt statutes like the challenged provisions of Maine's Tobacco Delivery law. While Maine's restrictions and requirements, by themselves, may not overwhelm air carriers, these restrictions cannot be considered in isolation because Maine is not the only state to have enacted provisions of this sort. To the contrary, numerous other states have passed similar laws pertaining to tobacco delivery, each with different requirements. *See N.H. Motor Transp. Ass'n v. Rowe*, 377 F. Supp. 2d 197, 204–05 (D. Me. 2005) ("Although

these state tobacco delivery laws involve similar limitations on tobacco shipments, the specific requirements vary by state."); *see also* States' *Amici* Br. 26–27 (noting that twenty-seven states require tobacco products to be labeled as such, seven states require delivery to a licensed entity, eighteen states impose age-verification requirements but not directly on the carrier, etc.); *id.* at 12 ("[S]tates differ in the restrictions they impose . . . ."). Left undisturbed by federal preemption, the Maine law—and other similar state laws "related to" the prices, routes and services of carriers—would create exactly the unmanageable patchwork of state regulations that Congress sought to avoid. This is amply illustrated by even a cursory examination of the laws of several states.

For example, New York's law on the delivery of tobacco products imposes significantly different requirements than Maine's statutes. *See* N.Y. Pub. Health Law §§ 1399-*ll*(1)–(2) (McKinney 2002). It requires carriers to consult New York's own, unique list of licensed tobacco retailers before delivering tobacco products. *Id.* New York's law also prohibits the delivery of cigarettes to any home or residence, *id.*, while Maine's statutes permit delivery to a home but require the carrier to deliver the package only to the addressee himself, *see* Me. Rev. Stat. Ann. tit. 22, § 1555-C(3)(C)(2).

Idaho law imposes very different restrictions. It imposes no limitations on delivery to a home rather than a licensed retailer, but it considers a carrier that delivers a package labeled as containing tobacco products to be a "distributor" of such products. Idaho Code Ann. § 39-5717 (Supp. 2007). Thus, carriers who

wish to avoid liability in Idaho may have to comply with a number of unique requirements, including obtaining a tobacco permit, *id.* § 39-5704; verifying that tobacco products are in "the federally required sealed package provided by the manufacturer," *id.* § 39-5707(1), which may require opening the shipping packaging; requesting and examining photo identification from the recipient, *id.* § 39-5705; and ensuring that the entity selling the tobacco obtained proof that the purchaser was at least 18 years old, the credit or debit card was issued in the purchaser's name, and the shipping address matched the credit card company's address for the cardholder, *id.* § 39-5715.

Unlike Idaho and Maine, Illinois establishes requirements only for cigarette deliveries, not for all tobacco products. 720 Ill. Comp. Stat. Ann. § 678/5 (West 2004). Illinois law requires carriers to accept cigarette deliveries only from licensed distributors, which requires them to consult Illinois' individualized list of such distributors. *Id.* § 678/5(a). Likewise, carriers may deliver cigarettes in Illinois only to licensed distributors, unless they obtain from the purchaser proof of age and a signed certification confirming a variety of specific information, including that the cigarettes are not intended for consumption by a minor; that the purchaser understands that signing another person's name to the certification is illegal; and that the purchase of cigarettes by a minor is illegal under Illinois law. *Id.* § 678/5(c).

Michigan law, on the other hand, does not require carriers to obtain information regarding the purchaser's age, but it does require them to review

official identification from the person signing for the delivery confirming that he is the purchaser. Mich. Comp. Laws Ann. § 205.431(4) (West Supp. 2007). Rhode Island law is similar, but still different. Unlike Michigan, Rhode Island requires carriers to obtain the signature of the purchaser himself *or* the signature of an adult at the purchaser's address before delivering tobacco products. R.I. Gen. Laws § 11-9-13.11(b) (2005). Moreover, Rhode Island, unlike Michigan, does not require carriers to verify the recipient's identity through official identification. *Id.*

Washington State imposes still different requirements on carriers delivering cigarettes. Under Washington law, carriers must verify the age of the recipient upon delivery through official identification, Wash Rev. Code Ann. §§ 70.155.105(1)(a), (4)(b) (West Supp. 2007), and must obtain written certification that, among other things, the receiver is not a minor and has "the option to receive mailings from a tobacco company about tobacco products," *id.* § 70.155.105(1)(b). Washington law apparently also requires carriers to verify the information provided by the consumer in the certification against a database or obtain a photocopy of their official identification, and to provide a detailed notice to the consumer regarding the purchase of tobacco products in Washington. *Id.* § 70.155.105(2).

As these examples show, the wide array of state regulations relating to carriers' delivery of tobacco

products are confusing at best.[6] Moreover, as petitioner and its *amici* States point out, states have not stopped at regulating only delivery or only tobacco. Instead, they have attempted to regulate both the transportation and delivery of a variety of items. *See* Pet. Br. 23 & nn.36–37 (citing Maine's regulations on the delivery of a variety of items); States' *Amici* Br. 25 (Maine's Tobacco Delivery law is only one of "myriad state laws regulating the transportation and delivery of dangerous products"). As the *amici* States pointed out in their brief to the First Circuit, "[t]he State of New York alone has at least eleven provisions regulating the transportation or delivery of harmful or illicit items other than cigarettes," and "[a]nalogous laws in other States are too numerous to set forth here." States' First Circuit *Amici* Br. 28–29. Without preemption, air carriers that transport items colorably subject to New York's existing regulations may have to comply with eleven different state law provisions, each of which may impose several individual requirements, to ensure that they lawfully transport a single item by air to New York. If all fifty states and the District of Columbia had, like New York, eleven such provisions regulating the delivery of certain items, air carriers might be obligated to comply with 561 different state laws just to provide their core service of interstate air transportation.

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[6] And the patchwork of laws is growing. Michigan's law, for instance, was enacted after the Respondents moved for summary judgment in the district court. *See also, e.g.*, Tenn. Code Ann. § 67-4-1029 (enacted in 2005); Nev. Rev. Stat. § 370.329 (enacted in 2005).

This is precisely the type of non-uniform regulatory burden that Congress sought to eliminate with the expansive preemption clause it included in the ADA and extended via the FAAAA.[7] Such an assortment of inconsistent state laws will "impede the free flow of trade, traffic and transportation in interstate commerce" in violation of Congress' intent, even if the states had the best of motives in enacting them. Thus, regardless of the worthiness of a state's reason for enacting it, the ADA and the FAAAA preempt any state law "related to" the services of air, motor, or intermodal carriers, including Sections 1555-C(3)(C) and 1555-D of Maine's Tobacco Delivery Law. To the extent that state policy concerns about health, safety, and welfare can be addressed only by regulation "related to" the prices, routes, or services of air and motor carriers, the states should ask Congress to impose national requirements to protect the public's interest.

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[7] Petitioner insists that *City of Columbus v. Ours Garage & Wrecker Serv., Inc.*, 536 U.S. 424 (2002), shows that Congress was not concerned about a patchwork of non-preempted state regulations. *See* Pet. Br. at 33, 42. In fact, as the *City of Columbus* decision shows, Congress was worried about a burdensome patchwork even with regard to regulations—unlike those at issue here—that it had specifically exempted from preemption. Thus, although Congress had explicitly excepted state safety regulations from preemption by the FAAAA, its concern that such regulations would "cause an unreasonable burden on interstate commerce" led it to empower the Secretary of Transportation to invalidate local safety regulations whose "multiplicity threatens to clog the avenues of commerce." *City of Columbus*, 536 U.S. at 441–42.

III. BECAUSE THE ADA AND THE FAAAA SHARE IDENTICAL PREEMPTIVE LANGUAGE, THE PRESUMPTION AGAINST PREEMPTION HAS NO APPLICATION IN THIS CASE.

Petitioner and its *amici* wrongly assert that a presumption against preemption arises in this case simply because Maine enacted Sections 1555-C(3)(C) and 1555-D pursuant to its police power. *See* Pet. Br. 25; States' *Amici* Br. 7; Br. of the Nat'l Conference of State Legislatures, et al. as *Amici Curiae* 4–10. While this Court has applied a presumption against preemption in certain circumstances, it has held that such a presumption does not apply in every case where a state has exercised its police power. *See United States v. Locke*, 529 U.S. 89, 108 (2000) (refusing to apply the presumption).[8] Instead, whether a presumption against preemption arises depends on the field in which Congress has legislated and whether the "state laws . . . in question bear upon" that field. *Id.* at 108. When Congress has legislated in a field that it (rather than the states) has historically regulated and the state laws at issue "bear upon" that field, "an assumption of nonpre-emption is not triggered." *Id.*; *see also Flagg v. Yonkers Sav. & Loan Ass'n*, 396 F.3d 178, 183 (2d Cir. 2005) ("The presumption against federal preemption disappears . . . in fields of regulation that have been substantially occupied by

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[8] The Court's refusal to apply the presumption against preemption in *Locke* demonstrates that its earlier comment that the presumption applied in all cases, *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996), was mere dicta.

federal authority for an extended period of time."). Because no presumption against preemption by the ADA would arise in the context of Sections 1555-C(3)(C) and 1555-D, there is likewise no presumption against preemption by the FAAAA.

No presumption against preemption by the ADA would arise with regard to the challenged provisions of Maine's Tobacco Delivery Law because, in enacting the ADA, Congress legislated in the field of air transportation, a field with a history of significant federal presence. Congress' involvement in the air transportation industry began in 1938, with its enactment of the Civil Aeronautics Act of 1938, Pub. L. No. 75-706, 52 Stat. 973 (1938), which established a scheme of comprehensive regulation of the airline industry.[9] In 1958, Congress adopted "a more comprehensive regulatory regime" for the air

[9] Justice Jackson described the extent of federal control of air transportation this way:

> [Planes] move only by federal permission, subject to federal inspection, in the hands of federally certified personnel and under an intricate system of federal commands. The moment a ship taxis onto a runway it is caught up in an elaborate and detailed system of controls. It takes off only by instruction from the control tower, it travels on prescribed beams, it may be diverted from its intended landing, and it obeys signals and orders. Its privileges, rights and protection, so far as transit is concerned, it owes to the Federal Government alone and not to any state government.

Northwest Airlines v. Minnesota, 322 U.S. 292, 303 (1944) (Jackson, J., concurring).

transportation industry, *Sam L. Majors Jewelers v. ABX, Inc.*, 117 F.3d 922, 927 n.7 (5th Cir. 1997), and, in the early 1970s, engaged in even "greater governmental involvement in the airline market," PAUL STEPHEN DEMPSEY, Transportation: A Legal History, 30 TRANSP. L.J. 235, 313 (2003). And, although Congress freed air carriers from much of this control with the advent of deregulation and the passage of the ADA in 1978, it did not open the field for control by the states. Instead, Congress explicitly prohibited states from exercising control in the field of air transportation by enacting the ADA's broad preemption clause, which is now codified at 49 U.S.C. § 41713(b)(1). Thus, the field in which Congress acted in enacting the ADA—air transportation—is one that has long been occupied by the federal government, rather than the states.

Sections 1555-C(3)(C) and 1555-D of Maine's Tobacco Delivery Law "bear upon" this field of air transportation. The very title of Maine's law—An Act to Regulate the Delivery and Sales of Tobacco Products and to Prevent the Sale of Tobacco Products to Minors, 2003 Me. Laws 444—indicates that it affects the delivery of packages through air transportation, which is the primary service offered by some members of the Airline Association, such as FedEx Express. The substance of Maine's law dictates which air carriers tobacco retailers may use and regulates those air carriers' delivery of tobacco products. Petitioner even admits that Maine's Tobacco Delivery law "regulate[s] carriers," Pet. Br. i, and is "literally . . . related to carrier services," Pet. Br. 22–23. Since some members of the Airline Association provide the kinds of services Maine's Tobacco Delivery Law seeks to regulate, the

Law clearly "bear[s] upon" air transportation. Thus, Maine's Sections 1555-C(3)(C) and 1555-D "regulate[] in an area where there has been a history of significant federal presence." *Locke*, 529 U.S. at 108.

In this circumstance, it is immaterial that Maine may have enacted Sections 1555-C(3)(C) and 1555-D due, in part, to concern about the health of its citizens, as petitioner and *amici curiae* in support of petitioner contend. *See* Pet. Br. 25; States' *Amici* Br. 8–9; Br. of the Nat'l Conference of State Legislatures, et al. as *Amici Curiae* 4-10. In *Locke*, the Court considered whether federal statutes governing oil tankers preempted laws enacted by Washington State, pursuant to its police powers, to protect its local environment from the damages of oil spills. *Locke*, 529 U.S. at 95–97. Although the Court recognized both the "historic role of the States to regulate local ports and waters" and that Washington's laws were enacted under its police powers, the Court also determined that Washington's laws bore upon the historically federal fields of national and international maritime commerce. *Id.* at 108–09. Because Washington's laws impinged on those historically federal fields, whether intentionally or not, no presumption against preemption was triggered. *Id.*; *see also, e.g., United Parcel Serv., Inc. v. Flores-Galarza*, 318 F.3d 323, 336 (1st Cir. 2003) (no presumption against preemption arises where a state tax law bears on the field of air transportation, even though taxation is a field historically reserved to the states). In other words, no presumption against preemption arises when state legislation implicates two fields—one historically

subject to federal authority and one historically subject to state authority.[10]

This principle applies with full force here. Regardless of whether Maine specifically intended Sections 1555-C(3)(C) and 1555-D to bear upon air transportation, the fact is that they do so (even if they also implicate the field of public health). Because air transportation is a field with a history of significant federal presence, there is no presumption of non-preemption of those laws by the ADA or, as the Court put it in *Locke*, "there is no beginning assumption that concurrent regulation by the State is a valid exercise of its police power." *Locke*, 529 U.S. at 108; *see Morales*, 504 U.S. at 383–91 (ignoring the presumption against preemption, over the dissent's argument that it should apply, in interpreting the ADA). Likewise, because Congress intended the preemptive scope of the FAAAA to be identical to that of the ADA, *see supra*, the presumption also has no application in the context of the FAAAA. *See N.H. Motor Transp. Ass'n v. Rowe*, 377 F. Supp. 2d 197, 206 (D. Me. 2005) (because the presumption against preemption does not apply to air transportation, it also does not apply to ground transportation "because the purpose of the FAAAA's preemption provisions was to even the playing field for air and ground transportation").

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[10] The presumption against preemption will arise when both the federal statute and the state legislation implicate only a field of traditional state authority, such as public health. *See Pharm. Research & Mfrs. of Am. v. Walsh*, 538 U.S. 644, 666 (2003); *Hillsborough County v. Automated Med. Labs., Inc.*, 471 U.S. 707, 715–18 (1985).

IV. SECTIONS 1555-C(3)(C) AND 1555-D ARE CLEARLY PREEMPTED BY THE PLAIN LANGUAGE OF THE ADA AND THE FAAAA.

No presumption against preemption is appropriate in this case. *See supra*. Even if such an "assumption of nonpre-emption" were to apply with regard to Sections 1555-C(3)(C) and 1555-D, however, it would make no difference because the express preemptory language of the FAAAA would overcome it. *See Egelhoff v. Egelhoff*, 532 U.S. 141, 151 (2001) (any presumption against federal preemption of state law is overcome "where . . . Congress has made clear its desire for pre-emption"). Congress has expressed its desire for the preemption of laws like Sections 1555-C(3)(C) and 1555-D through the plain language of the ADA. *See Holloway v. United States*, 526 U.S. 1, 6 (1999) ("[T]he language of the statutes that Congress enacts provides 'the most reliable evidence of its intent.'") (quoting *United States v. Turkette*, 452 U.S. 576, 593 (1981)). And, because the FAAAA contains preemptive language identical to that of the ADA, it also overcomes any presumption against preemption as to the statutory provisions at issue here.

Sections 1555-C(3)(C) and 1555-D are preempted by the plain language of the ADA because they directly relate to the services of any air carrier that might be a "delivery service" under the Maine statute. Those statutes purport to require air carriers to comply with a number of requirements in the course of delivering packages to recipients in Maine. Under Maine's law, delivery services, including air carriers, who wish to avoid penalties are asked, at the very least, to: (1) inspect packages for markings indicating that they contain tobacco products, 22 Me. Rev. Stat. Ann. tit. 22, § 1555-D; (2) examine lists provided by Maine's Attorney General to determine if the sender is a licensed tobacco retailer in Maine, *id.*; (3) refuse to deliver packages from anyone listed as an unlicensed tobacco retailer (unless the recipient is licensed), *id.*; (4) deliver packages only to the specific addressee, *id.* § 1555-C(3)(C)(1); (5) obtain the age of the addressee from the sender, *id.* § 1555-C(3)(C)(2); (6) require the addressee to sign for the package, *id.*; and (7) verify, by requesting to see government-issued, photo identification, the age of any addressee under twenty-seven years old, *id.* § 1555-C(3)(C)(3).

These types of activities—sorting and handling packages, refusing delivery of packages, delivering packages when the addressee is not available, delivering packages with or without obtaining a signature, etc.—comprise the heart of the services provided by those Airline Association members that provide delivery services. As such, Sections 1555-C(3)(C) and 1555-D are "related to" the services of an air carrier within the meaning of the ADA.[11]

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[11] Some carriers have voluntarily adopted policies limiting their delivery of tobacco products. FedEx Express, for example, delivers tobacco products only from one licensed dealer or distributor to another licensed dealer or distributor. *See* FedEx Service Guide, *available at* http://www.fedex.com/us/services/terms/popup_tc_us_body.html#tobaccoproducts. That is irrelevant to ADA preemption analysis, however, because, as this Court has recognized, the distinction between a self-imposed limitation and

(continued...)

Accordingly, Sections 1555-C(3)(C) and 1555-D are preempted by the plain language of the ADA and, because the two statutes share identical preemptory language, by the FAAAA.[12]

CONCLUSION

Because the ADA preempts Sections 1555-C(3)(C) and 1555-D of Maine's Tobacco Delivery Law, the FAAAA should preempt them as well. This is so even if the presumption against preemption applies, which it clearly does not. Accordingly, *amici curiae* FedEx Express and the Air Transport Association of America,

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[11](...continued)
a legally imposed one is significant. *See Wolens*, 513 U.S. at 221 ("We hold that the ADA's preemption prescription bars state-imposed regulation of air carriers, but allows room for court enforcement of contract terms set by the parties themselves."). Moreover, FedEx Express' Service Guide makes clear that the responsibility for complying with state regulations lies with the shipper, while Maine's Tobacco Delivery Law attempts to impose that responsibility on the carrier.

[12] The "tenuous, remote, and peripheral" exception has no application here. Under this exception, the ADA does not preempt a state law whose connection with the prices, routes, or services of an air carrier is simply too distant. *See Morales*, 504 U.S. at 390. As discussed above, the requirements that Sections 1555-C(3)(C) and 1555-D purport to impose affect core services that an air carrier may provide. The connection between the statutes and an air carrier's services, therefore, is anything but tenuous, remote, or peripheral.

Inc., urge the Court to affirm the grant of judgment in favor of Respondents.

Respectfully submitted,

ROBERT K. SPOTSWOOD
Counsel of Record
KENNETH D. SANSOM
EMILY J. TIDMORE
SPOTSWOOD SANSOM & SANSBURY LLC
940 Concord Center
2100 Third Avenue North
Birmingham, AL 35203
(205) 986-3620

Counsel for Amici Curiae *Federal Express Corporation and the Air Transport Association of America, Inc.*

CONNIE LEWIS LENSING
R. JEFFERY KELSEY
FEDERAL EXPRESS CORPORATION
LEGAL DEPARTMENT, LITIGATION
3620 Hacks Cross Road
Third Floor, Building B
Memphis, TN 38125
(901) 434-8432

Counsel for Amicus Curiae *Federal Express Corporation*

(9)

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IN THE

Supreme Court of the United States

G. STEVEN ROWE, In His Official Capacity As Attorney General of the State of Maine,
Petitioner,

v.

NEW HAMPSHIRE MOTOR TRANSPORT ASSOCIATION, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

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BRIEF OF THE NATIONAL CONFERENCE OF STATE LEGISLATURES, NATIONAL LEAGUE OF CITIES, COUNCIL OF STATE GOVERNMENTS, U.S. CONFERENCE OF MAYORS, NATIONAL ASSOCIATION OF COUNTIES, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION AND INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION AS *AMICI CURIAE* SUPPORTING PETITIONER

STEVEN H. GOLDBLATT
CECILY E. BASKIR
RICHARD H. FRANKEL
GEORGETOWN UNIVERSITY LAW CENTER
APPELLATE LITIGATION PROGRAM
111 F Street, N.W.
Washington, D.C. 20001
(202) 662-9555

RICHARD RUDA *
STATE AND LOCAL LEGAL CENTER
444 North Capitol Street, N.W.
Washington, D.C. 20001
(202) 434-4850

SCOTT L. NELSON
PUBLIC CITIZEN LITIGATION GROUP
1600 20th Street, N.W.
Washington, D.C. 20009
(202) 588-7724

* Counsel of Record

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D.C. 20002

QUESTION PRESENTED

Whether the Federal Aviation Administration Authorization Act of 1994 preempts the Maine Tobacco Delivery Law, which prohibits the delivery to Maine's children of cigarettes and other tobacco products they have illegally purchased over the internet or by other electronic means.

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INTEREST OF THE *AMICI CURIAE*

Amici, organizations whose members include state and local governments and officials throughout the United States, have a strong interest in this Court's preemption jurisprudence.[1] This case turns on the application of one of the Court's most venerable preemption doctrines: the strong presumption against preemption of state health laws, which are displaced by federal law only if "that was the clear and manifest purpose of Congress." *N.Y. State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 654-55 (1995). The court of appeals cavalierly dismissed this presumption in a footnote and disregarded the Court's many cases, starting with *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824), which have respected the States' primary responsibility to protect their citizens' health. Because of the States' central role in preventing children from buying cigarettes illegally, and the importance of correcting the erroneous application of preemption principles by the court below, *amici* respectfully submit this brief to assist the Court in the resolution of this case.

SUMMARY OF ARGUMENT

1. Two centuries of the States' protection of their citizens' health -- a history that has long been recognized and respected by this Court -- militate against a finding of preemption in this case. This judicial deference was expressed by the Court at least as early as *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 203 (1824), in which Chief Justice Marshall wrote that "health laws of every description" are part of "that immense mass of legislation, which embraces everything within the territory of a State, not surrendered to the [federal]

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[1] The parties have consented to the filing of this brief, which was not authored in whole or in part by counsel for any party. No person or entity other than *amici* and their members made a monetary contribution to the preparation or submission of this brief.

government." Since *Gibbons*, this Court has repeatedly reaffirmed the States' right and responsibility to enact public health laws. For example, in *Jacobson v. Massachusetts*, 197 U.S. 11, 27 (1905), Justice Harlan wrote for the Court that "[u]pon the principle of self-defense, of paramount necessity, a community has the right to protect itself against an epidemic of disease which threatens the safety of its members."

An ineluctable consequence of the reservation to the States of the right and duty to protect public health is the strong presumption against preemption of state health laws. The Court has "never lightly assumed that Congress has derogated state regulation, but instead h[as] addressed claims of preemption with the starting presumption that Congress does not intend to supplant state law." *N.Y. State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 655 (1995).

The presumption is particularly powerful in areas of governance reserved to the States; in such cases the Court has "worked on the assumption that the historic police powers of the State were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Id.* (citation and internal quotations omitted). Even in cases where it is clear that Congress intended a statute to have some preemptive effect, the presumption plays an important role in limiting preemption to the scope clearly delineated by Congress.

2. In this case the record does not manifest *any* congressional intent to preempt state laws, like Maine's, that prevent children from illegally purchasing cigarettes over the internet. On the contrary, all indicia of congressional intent reinforce the conclusion that Congress did not intend the FAAAA to preempt Maine's Tobacco Delivery Law.

The reference to laws "related to a price, route, or service" in § 601, the FAAAA's express preemption provision, is

plainly inadequate to determine whether Maine's law falls within the scope of Congress's preemptive intent. The language "related to" in § 601 is inherently unclear. Because the statute's language is not dispositive, the Court must look beyond it to the FAAAA's objectives, structure, and purpose, and the impact of Maine's law on the federal regulatory scheme.

The legislative history of the FAAAA establishes that Congress's primary concern in § 601 was to eliminate state economic regulation of air and motor carriers, including back-door attempts by States at *de facto* economic regulation, such as state laws designed directly to influence carrier prices or create barriers to entry. But Congress did not intend to preempt state regulation that did not implicate such concerns. For example, the FAAAA expressly saves state laws that regulate safety and highway routes based on vehicle size or the hazardous nature of cargo, as well as state insurance requirements. Moreover, the FAAAA's list of non-preempted areas is not all-inclusive but merely specifies some of the matters which are not "prices, rates, or services" where state regulation is subject to preemption.

Another important component of preemption analysis is an examination of evidence of Congress's intent to preserve or rely upon the complementary exercise of state authority notwithstanding the creation of a federal regulatory structure. Preemption is less likely in areas in which Congress has specifically encouraged the States to act. The federal legislative and regulatory framework concerning cigarettes and other tobacco products strongly indicates that Congress did not intend to preempt Maine's Tobacco Delivery Law. Congress has specifically given the States the responsibility to regulate the retail sale of tobacco products to children and precluded federal agencies from engaging in this type of regulation.

To be effective, state laws designed to prevent children from purchasing cigarettes online or by telephone will have

some effect on motor carriers that deliver tobacco products. Given tobacco's well-known toxicity and the States' role in protecting public health, if Congress had intended to prevent States from interdicting internet sales of tobacco to children simply because motor carriers are involved, it surely would have made its intention to do so clear. It defies common sense even to suggest -- much less to rule like the court below -- that Congress considered a minimal effect on motor carriers more important than protecting the health of children who illegally purchase cigarettes over the internet.

ARGUMENT

This case turns on the proper application of the strong presumption against preemption of state health statutes, which are displaced only if "that was the clear and manifest purpose of Congress." *N.Y. State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 655 (1995) (citation omitted). The court of appeals brushed aside this historic presumption, Pet. App. 14 n. 10, and ignored persuasive indicia that Congress did not intend the Federal Aviation Administration Authorization Act of 1994 to preempt Maine's Tobacco Delivery Law. The potentially lethal consequences of this erroneous ruling for children in Maine and many other States warrant reversal of the judgment below.

I. THE STRONG PRESUMPTION AGAINST PREEMPTION OF STATE HEALTH LAWS IS DEEPLY ROOTED IN THIS COURT'S RECOGNITION OF THE STATES' PRIMARY REPONSIBILITY TO PROTECT THEIR CITIZENS' HEALTH

The strong presumption against preemption of state health laws reflects a deference that has existed since the founding of the nation. "Throughout our history the several States have exercised their police powers to protect the health and

safety of their citizens." *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 475 (1996). "Because these are 'primarily and historically, . . . matter[s] of local concern,' *id.* (quoting *Hillsborough County v. Automated Med. Labs., Inc.*, 471 U.S. 707, 719 (1985)), the 'States have had great latitude under their police powers to legislate as to the protection of the lives, limbs, health, comfort, and quiet of all persons.'" *Id.* (quoting *Metro. Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 756, (1985)).

The powers of the States are, of course, limited by the Constitution, and Congress may, in the exercise of its enumerated powers, supersede state laws. *See Hillsborough County*, 471 U.S. at 712-13. Yet "despite the variety of . . . opportunities for federal preeminence," this Court has "never assumed lightly that Congress has derogated state regulation, but instead h[as] addressed claims of pre-emption with the starting presumption that Congress does *not* intend to supplant state law." *Travelers*, 514 U.S. at 654 (emphasis added). Particularly in cases that implicate the States' right and duty to protect health and "where federal law is said to bar state action," the Court "work[s] on the 'assumption that the historic police powers of the States were not to be superseded by [a] Federal Act unless that was the clear and manifest purpose of Congress.'" *Id.* at 655 (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)).

Deference to a State's exercise of its police powers to protect public health is a bedrock federalism principle repeatedly recognized and applied by the Court. The police power was "not granted by or derived from the Federal Constitution but exists independently of it, by reason of its never having been surrendered by the State to the General Government." *House v. Mays*, 219 U.S. 270, 282 (1911). This deference is evidenced in the Court's cases rejecting challenges to the validity of public health laws under the Supremacy Clause, the Commerce Clause, and the Fourteenth Amendment.

Express recognition of the reservation of health regulation to the States came at least as early as *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824). In *Gibbons*, Chief Justice Marshall stated for the Court that "health laws of every description" are part of "that immense mass of legislation, which embraces every thing within the territory of a State, not surrendered to the [federal] government." *Id.* at 203. "No direct general power over these objects is granted to Congress," the Chief Justice wrote, "and, consequently, they remain subject to State legislation." *Id.*[2]

In the nearly 200 years since *Gibbons*, States have enacted countless laws to protect the public health. This Court has repeatedly affirmed their right to use police powers in this manner, absent clear and manifest evidence that the particular state action has been preempted by Congress or that it violates a specific constitutional guarantee.

In 1877, the Court "unhesitatingly admit[ted] that a State may pass sanitary laws, and laws for the protection of life, liberty, health, or property within its borders" that are "necessary for its self-protection." *Railroad Co. v. Husen*, 95 U.S. 465, 472 (1877). Although *Husen* invalidated a Missouri statute that prohibited shipments of all "Texas, Mexican, or Indian cattle" through the State, *id.* at 469, it would, said the unanimous Court, be well within the police power of the State to exclude "animals having contagious or infectious diseases." *Id.* at 471. Such a valid "exertion[] of power [is] in immediate connection with the protection of

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[2] *See also The Federalist Number 17* (Hamilton) 118 (C. Rossiter ed. 1961) (noting reservation to the States of the "domestic police of a State"). "Police" as used by Hamilton undoubtedly referred to "[t]he regulation, discipline, and control of a community; civil administration; enforcement of law." *Oxford Universal Dictionary on Historical Principles* 1536 (3d rev. ed. Oxford: Clarendon Press, 1955); *accord Webster's Third New International Dictionary* 1754 (1976).

persons and property against noxious acts of other persons. . . . They are self-defensive." *Id.* at 471.

Holden v. Hardy, 169 U.S. 366 (1898), upheld against a Fourteenth Amendment challenge a state statute whose design and purpose was to protect citizens' health. In 1896 the Utah legislature limited the hours of workers in coal mines or smelters to eight per day because "[t]hese employments, when too long pursued, the legislature has judged to be detrimental to the health of the employes." *Id.* at 395. In upholding this statute, the Court explained the foundation of the State's police power to protect the health of its citizens:

> It is as much for the interest of the State that the public health should be preserved as that life should be made secure. With this end in view quarantine laws have been enacted in most if not all of the States; insane asylums, public hospitals and institutions for the care and education of the blind established, and special measures taken for the exclusion of infected cattle, rags and decayed fruit.

Id. at 395. Given the long tradition of the States' right and duty to protect public health and the variety of contexts in which it had been exercised, the *Holden* Court concluded that "[t]he whole is no greater than the sum of all the parts, and when the individual health, safety and welfare are sacrificed or neglected, the State must suffer." *Id.* at 397 (internal quotation omitted).

Two years later, the Court again showed deference to the state police power. In *Austin v. Tennessee*, 179 U.S. 343 (1900), it acknowledged Tennessee's right to prohibit in-state sales of cigarettes "for the protection of public health." *Id.* at 349. Regarding cigarettes, the Court observed, "we think it within the province of the legislature to say how far they may be sold, or to prohibit their sale entirely . . . provided no discrimination be used as against such as are imported from

other States, and there be no reason to doubt that the act in question is designed for the protection of the public health." *Id.* at 348-49. The Court summarized its respect for state health measures as follows:

> We have had repeated occasion to hold, where state legislation has been attacked as violative either of the power of Congress over interstate commerce, or of the Fourteenth Amendment to the Constitution, that, if the action of the state legislature were a *bona fide* exercise of its police power, and dictated by a genuine regard for the preservation of the public health or safety, such legislation would be respected, though it might interfere indirectly with interstate commerce.

Id. at 349.

The States' right to protect their citizens' health also was the basis for the Court's rejection of a Fourteenth Amendment challenge to a state compulsory vaccination law. In *Jacobson v. Massachusetts*, 197 U.S. 11 (1905), Justice Harlan wrote for the Court that "[u]pon the principle of self-defense, of paramount necessity, a community has the right to protect itself against an epidemic of disease which threatens the safety of its members." *Id.* at 27. Indeed, "[a]ccording to settled principles the police power of a State must be held to embrace, at least, such reasonable regulations established directly by legislative enactment as will protect the public health and the public safety." *Id.* at 25.

New York ex rel. Lieberman v. Van De Carr, 199 U.S. 552 (1905), upheld the validity of licensing of persons engaged in the sale or delivery of milk. The Court reaffirmed "[t]he right of the State to regulate certain occupations which may become unsafe or dangerous when unrestrained, in the exercise of the police power, with a view to protect the public health and welfare. . . ." *Id.* at 558. *Lieberman* stands for "the proposition that the State has a right, by reasonable regula-

tion, to protect the public health and safety." *Id.* (collecting cases).

To this day, the Court continues to respect the role of state power in protecting the health and safety of their citizens. Last Term, in *United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Management Authority*, 127 S.Ct. 1786 (2007), the Court stressed that state and local governments are "vested with the *responsibility* of protecting the health, safety, and welfare of [their] citizens," *id.* at 1795 (emphasis added), in the exercise of which they have "great latitude," *id.* (citing *Metro. Life Ins. Co.*, 471 U.S. at 756), and with which the federal courts "should be particularly hesitant to interfere," *id.* at 1796. *See also Gonzales v. Oregon*, 546 U.S. 243, 271 (2006) ("regulation of health and safety is 'primarily, and historically, a matter of local concern'") (citation omitted); *Medtronic*, 518 U.S. at 475; *Hillsborough County*, 471 U.S. at 718-19 (1985).

The presumption against preemption is an ineluctable consequence of the Court's historic deference to the States' exercise of the police power to protect public health. It ensures that state health laws will be protected from preemption. Only a showing of a clear and manifest purpose of Congress to preempt state action will suffice to "overcome the presumption that state and local regulation of health and safety matters can constitutionally co-exist with federal regulation." *Hillsborough County*, 471 U.S. at 716.

The Court has repeatedly invoked the presumption, both as to the *existence* of preemption and as to its *scope*, even in cases where it is clear that Congress intended a statute to have some preemptive effect. *See, e.g., Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 450-52 (2005); *De Buono v. NYSA-ILA Med. & Clinical Servs. Fund*, 520 U.S. 806, 813 n.8 (1997); *Medtronic*, 518 U.S. at 485; *Hawaiian Airlines, Inc. v. Norris*, 512 U.S. 246, 252 (1994); *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 517 (1992); *Wisconsin Public Intervenor v.*

Mortier, 501 U.S. 597, 604-05, 611 (1991); *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977); *Rice*, 331 U.S. at 230. Here the relevant indicia do not manifest *any* evidence of congressional intent to preempt state laws to prevent children from buying cigarettes over the internet. Instead, they reinforce the conclusion that Congress intended to leave this vital sphere of public health law to the States.

II. IN ENACTING THE FAAAA, CONGRESS DID NOT CLEARLY AND MANIFESTLY INTEND TO PREEMPT MAINE'S TOBACCO DELIVERY LAW

While § 601 of the FAAAA precludes States from economically regulating a motor carrier's prices, routes, and services, it falls far short of being the clear and manifest statement of congressional intent required to invalidate Maine's Tobacco Delivery Law. Moreover, the legislative history of the FAAAA and other federal legislation directing the States to regulate the sale of tobacco products reinforce the conclusion that Congress had no intention to preempt Maine's law merely because it may, at most, place minimal obligations on motor carriers.

Turning first to the statute itself, the text of the FAAAA's preemption provision must be construed "in light of the presumption against the pre-emption of state police power regulations" discussed above. *Cipollone*, 505 U.S. at 518; *see also Medtronic*, 518 U.S. at 485. While Congress's express intent in the FAAAA was to preempt some state laws, § 601's general reference to state laws "related to a price, route, or service of" a motor or air carrier, 49 U.S.C. §§ 14501(c)(1), 41713(b)(4)(A), is plainly inadequate to determine whether Maine's Tobacco Delivery Law falls within the scope of Congress's preemptive intent. As this Court has repeatedly held, an express preemption clause that uses the language "relate to" to indicate its scope is unclear because "[i]f 'relate

to' were taken to extend to the furthest stretch of its indeterminacy, then for all practical purposes pre-emption would never run its course, for really, universally, relations stop nowhere." *Travelers*, 514 U.S. at 655 (internal citations omitted).

In *Travelers*, the Court ruled that the indeterminate phrase "relate to" does not alter the Court's strong presumption against preemption of state health laws. *See* 514 U.S. at 655; *De Buono*, 520 U.S. at 813 (discussing the *Travelers* decision). *Travelers* held that an open-ended construction of "relate to" provides no guidance at all because "that, of course, would be to read Congress's words of limitation as mere sham, and to read the presumption against pre-emption out of the law whenever Congress speaks to the matter with generality." 514 U.S. at 655; *see also Egelhoff v. Egelhoff*, 532 U.S. 141, 146 (2001); *California Div. of Labor Standards Enforcement v. Dillingham Constr., N.A., Inc.*, 519 U.S. 316, 325 (1997); *id.* at 335 (Scalia, J., concurring) ("applying the 'relate to' provision according to its terms was a project doomed to failure, since, as many a curbstone philosopher has observed, everything is related to everything else").[3]

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[3] The court of appeals believed its decision was dictated by *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374 (1992), Pet. App. at 16-17, but this reliance was misplaced. *Morales* recognized limits to the Airline Deregulation Act of 1978's preemptive scope, Pub. L. No. 95-504, 92 Stat. 1705 (1978) ("ADA"), noting that "[s]ome state actions may affect [airline fares] in too tenuous, remote, or peripheral a manner for the federal statute to have preemptive effect." *Morales*, 504 U.S. at 390 (quoting *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 100 n.21 (1983)) (internal citations omitted). Indeed, the *Morales* Court expressly recognized that "[i]n this case, as in *Shaw*, '[t]he present litigation plainly does not present a borderline question, and we express no views about where it would be appropriate to draw the line.'" *Id.* (quoting *Shaw*, 463 U.S. at 100 n.21). The facts presented in *Morales* clearly justified the Court's reluctance to define the outer limits of preemption. *Morales* dealt with state efforts to regulate airline price advertising, a domain expressly preempted by the

Thus, in this case as in *Travelers* and *Dillingham*, the language of the statute is not dispositive. Therefore the Court "must go beyond the unhelpful text and the frustrating difficulty of defining its key term, and look instead to the objectives of the [federal] statute as a guide to the scope of the state law that Congress understood would survive" preemption. *Travelers*, 514 U.S. at 656. The Court looks to "the structure and purpose of the statute as a whole, as revealed not only in the text, but through the reviewing court's reasoned understanding of the way in which Congress intended the statute and its surrounding regulatory scheme to affect business, consumers, and the law." *Medtronic*, 518 U.S. at 486 (internal citation omitted). The Court also looks to other indicia of congressional intent, such as the federal legislative and regulatory scheme in the area of the challenged state action. *See Dillingham*, 519 U.S. at 319-21, 331 n.7; *Travelers*, 514 U.S. at 665-67; *Wolens*, 513 U.S. at 228-32.

The Court also must examine "the nature of the effect of the state law" on the prices, routes, and services of air and motor carriers to determine congressional intent. *See Dillingham*, 519 U.S. at 325; *see also Egelhoff*, 532 U.S. at 147. As this Court has repeatedly observed, the effects of some state laws on activities subject to federal regulation—in this case motor carriers' prices, routes, or services—are simply "too tenuous, remote, or peripheral . . . " to support the conclusion that Congress intended to preempt the state law. *Morales v. Trans*

ADA: "air carriers' 'rates, routes, or services." 504 U.S. at 378-79 (quoting 49 U.S.C. App. § 1305(a)(1)). Although protecting consumers from misleading advertising is an exercise of the police power, the state action preempted in *Morales* involved (1) attempts to regulate airline advertising that would have a significant impact on fares, *see* 504 U.S. at 388-90; *see also American Airlines, Inc. v. Wolens*, 513 U.S 219, 224 (1995), and (2) regulation of practices squarely within the regulatory sphere of the U.S. Department of Transportation. *See Morales*, 504 U.S. at 390-91; *Wolens*, 513 U.S. at 224. Under those facts, the Court found that state efforts to regulate airline price advertising were preempted.

World Airlines, Inc., 504 U.S. 374, 390 (1992) (quoting *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 100 n.21 (1983)). State action that exerts only an indirect or minimal economic influence on the prices, routes, or services of a carrier without binding the carrier to any particular choice is less likely to fall within the domain that Congress intended to preempt. *See Travelers*, 514 U.S. at 659-62 (indirect, nonbinding economic influence insufficient to trigger preemption); *Dillingham*, 519 U.S. at 332-34 (nonbinding economic incentive that was "substantially similar" to effect in *Travelers* not preempted).

In this case, the legislative history establishes that Congress's primary concern in § 601 was to eliminate state economic regulation of carriers, including back-door attempts by States at *de facto* economic regulation. *See Columbus v. Ours Garage & Wrecker Serv., Inc.*, 536 U.S. 424, 440 (2002) ("The problem to which the congressional conferees attended [in § 601] was state *economic* regulation.") (internal citation omitted) (emphasis in original). Congress concluded that "[s]tate economic regulation of motor carrier operations causes significant inefficiencies, increased costs, reduction of competition, inhibition of innovation and technology and curtails the expansion of markets." H.R. Conf. Rep. 103-677, at 87 (1994). As a result, Congress sought to eliminate "antiquated controls," *id.* at 88, that included state regulation of trucking prices "designed to ensure . . . that [prices] are kept high enough to cover all costs and are not so low as to be 'predatory'. . . [and] filing of tariffs and long intervals for approval to change prices." *Id.* at 87. Other forms of state regulation that Congress sought to preempt were barriers to entry that restricted competition for trucking routes and types of trucking business. *See id.* at 86.

Congress did not intend to preempt state regulation of motor carriers that did not implicate its concerns about economic regulation. *Id.* at 84-85. The FAAAA expressly saves the "safety regulatory authority of a State with respect to motor ve-

hicles, the authority of a State to impose highway route controls or limitations based on the size or weight of the motor vehicle or the hazardous nature of the cargo, [and] the authority of a State to regulate motor carriers with regard to minimum amounts of financial responsibility relating to insurance requirements and self-insurance authorization." 49 U.S.C. §§ 14501(c)(2), 41713(b)(4)(B)(i). Significantly, Congress emphasized that "[t]his list" of non-preempted areas "is not intended to be all-inclusive, but merely to specify some of the matters which are not 'prices, rates or services' and which are therefore not preempted." H.R. Conf. Rep. 103-677, at 84 (also describing the non-preempted state regulatory authority as only "partially identified" in the statute's exceptions provision). The FAAAA and its legislative history thus indicate that Congress did not intend for § 601 to have sweeping preemptive reach into all areas of traditional state authority that tangentially relate to motor carriers; it sought to prevent state economic regulation of carriers' prices, routes, or services.

Another important component of the Court's preemption analysis is an examination of indicia of congressional intent to preserve or rely upon the complementary exercise of state authority, notwithstanding the creation of a federal regulatory structure. *See Dillingham*, 519 U.S. at 319-21, 331 n.7; *Travelers*, 514 U.S. at 665-67; *Wolens*, 513 U.S. at 230-32. Of particular relevance here, the Court is less likely to find clear congressional intent to preempt state law in areas where Congress has specifically encouraged the States to act. *See Dillingham*, 519 U.S. at 331 n.7 (discussing Congress's intent to foster state statutes in the area of apprenticeship programs as support for holding that Congress did not intend to preempt California's prevailing wage law); *Travelers*, 514 U.S. at 665-67 (discussing Congress's intent to encourage state responses to growing health care costs and state experiments with comprehensive hospital reimbursement as support for holding that Congress did not intend to preempt New York hospital surcharge).

Here, the federal legislative and regulatory framework concerning cigarettes and other tobacco products strongly indicates that Congress did not intend to preempt Maine's Tobacco Delivery Law. Indeed, Congress has specifically given the States the responsibility to regulate the retail sale of tobacco products in order to prevent minors from obtaining them. *See Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 552 (2001); *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 155 (2000). The Synar Amendment to the Alcohol, Drug Abuse, and Mental Health Administration Reorganization Act, Pub. L. No. 102-321, § 202, 106 Stat. 394 (1992) (codified at 42 U.S.C. § 300x-26), passed only two years before the FAAAA, *directs* States to prohibit the sale and distribution of tobacco products to minors and to engage in related enforcement efforts. 42 U.S.C. § 300x-26.

Furthermore, as the Court has recognized, Congress "created a distinct scheme to regulate the sale of tobacco products, focused on labeling and advertising." *Brown & Williamson*, 529 U.S. at 156. At the same time, "Congress has persistently acted to preclude a meaningful role for *any* [federal] administrative agency in making policy on the subject of tobacco and health." *Id.* (emphasis in original). By prohibiting federal regulation in this area, Congress necessarily has left the weighty responsibility of preventing illegal sales of cigarettes to children to the States. *See Lorillard*, 533 U.S. at 552 ("Accordingly, the [Federal Cigarette Labeling and Advertising Act] does not pre-empt state laws prohibiting cigarette sales to minors.").

Given a regulatory scheme that makes the States responsible for prohibiting children from purchasing cigarettes, it strains credulity to assert that Congress intended the FAAAA to preempt Maine's Tobacco Delivery Law on the theory that it somehow constitutes state economic regulation of motor carriers. As in *Dillingham*, "Congress' silence on the preemption of state statutes that Congress previously sought to

foster counsels against pre-emption here." 519 U.S. at 331 n.7. Moreover, "[t]o interpret [the FAAAA's] pre-emption provision as broadly as respondents suggest . . . would [leave] States without the authority to do just what Congress was expressly trying to induce them to do" through the Synar Amendment. *Travelers*, 514 U.S. at 667. *See also Pharmaceutical Research & Mfrs. of America v. Walsh*, 538 U.S. 644, 666 (2003) ("The presumption against federal pre-emption of a state statute designed to foster public health has special force when it appears, and the Secretary has not decided to the contrary, that the two governments are pursuing common purposes.") (internal quotations and citations omitted).

It is also reasonable that, to be effective, any state law designed to prevent minors from purchasing tobacco products online or by telephone must have *some* effect on motor carriers that deliver tobacco products. In light of Congress's stated policy of directing States to prohibit sales of cigarettes to children, it is implausible that Congress intended to create a regulatory void in this critical area of public health when it enacted the FAAAA. *Cf. Pacific Gas & Elec. Co. v. State Energy Res. Conser. & Dev. Comm'n*, 461 U.S. 190, 207-08 (1983) ("It is almost inconceivable that Congress would have left a regulatory vacuum; the only reasonable inference is that Congress intended the States to continue to make these judgments."). Given tobacco's well-known toxicity, the States' compelling interest in preventing underage tobacco use, *Lorillard*, 533 U.S. at 564, and the long tradition of States protecting public health, if Congress had intended to *revoke* the States' power to interdict internet tobacco sales to children simply because motor carriers are involved, it would have made its intention clear and manifest in the FAAAA. *See Brown & Williamson*, 529 U.S. at 160 (Congress would not make "a decision of such economic and political significance" about tobacco regulation "in so cryptic a fashion"). *Cf. Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457,

468 (2001) (Congress "does not hide . . . elephants in mouseholes").

Furthermore, even assuming the Maine law affects the prices, routes, or services of carriers, it does so in too tenuous, remote, and peripheral a manner to warrant preemption. As petitioner explains, *see* Pet. Br. 7-8, § 1555-C imposes several obligations on tobacco *retailers* to prevent the sale of tobacco products to children, including the use of a delivery service that requires that the purchaser be the addressee, sign for the package, and show valid identification if under 27. *See* 22 Me. Rev. Stat. Ann. § 1555-C. Section 1555-D prohibits any person from knowingly transporting tobacco products from unlicensed retailers, and it deems knowledge that a package contains tobacco if it has been so marked or if the sender is listed by the Attorney General as an unlicensed tobacco retailer. *See* 22 Me. Rev. Stat. Ann. § 1555-D. As petitioner demonstrates in detail, *see* Pet. Br. 12-15, any effect of Maine's Tobacco Delivery Law on the prices, routes, or services of carriers will be at most indirect and *de minimis*.

Given the competing congressional interests involved and the long history of state primacy in protecting public health, it is unfathomable that Congress intended to preempt a vital state exercise of the power to protect children's health because of an at-most tangential effect on carriers' operations. As the Court declared in *Dillingham*, "We could not hold preempted a state law in an area of traditional state regulation based on so tenuous a relation without doing grave violence to our presumption that Congress intended nothing of the sort." 519 U.S. at 334.

There is no clear and manifest evidence that Congress, when seeking to achieve two goals—directing States to prevent children from buying cigarettes and deregulating the motor carrier industry—considered a minimal impact on motor carriers of greater consequence than protecting the health of the increasing numbers of children who buy cigarettes online.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

STEVEN H. GOLDBLATT
CECILY E. BASKIR
RICHARD H. FRANKEL
GEORGETOWN UNIVERSITY
LAW CENTER
APPELLATE LITIGATION
PROGRAM
111 F Street, N.W.
Washington, D.C. 20001
(202) 662-9555

August 23, 2007

RICHARD RUDA *
STATE AND LOCAL LEGAL
CENTER
444 North Capitol Street, N.W.
Washington, D.C. 20001
(202) 434-4850

SCOTT L. NELSON
PUBLIC CITIZEN LITIGATION
GROUP
1600 20th Street, N.W.
Washington, D.C. 20009
(202) 588-7724

* Counsel of Record

No. 06-457

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IN THE

Supreme Court of the United States

G. STEVEN ROWE, In His Official Capacity as Attorney General of the State of Maine,
Petitioner,

v.

NEW HAMPSHIRE MOTOR TRANSPORT ASSOCIATION, MASSACHUSETTS MOTOR TRANSPORTATION, INC., and VERMONT TRUCK & BUS ASSOCIATION, INC.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF FOR *AMICUS CURIAE* TOBACCO CONTROL LEGAL CONSORTIUM, CAMPAIGN FOR TOBACCO-FREE KIDS, AMERICAN LUNG ASSOCIATION, AND AMERICAN CANCER SOCIETY IN SUPPORT OF STATE OF MAINE PETITION FOR A WRIT OF CERTIORARI

MATTHEW MYERS *
Campaign for Tobacco-Free Kids
1400 Eye Street
Suite 1200
Washington, D.C. 20005
(202) 296-5469

* Counsel of Record

Counsel for Amicus Curiae

WILSON-EPES PRINTING CO., INC. - (202) 789-0096 - WASHINGTON, D. C. 20001

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IN THE

Supreme Court of the United States

No. 06-457

G. STEVEN ROWE, In His Official Capacity as Attorney General of the State of Maine,
Petitioner,

v.

NEW HAMPSHIRE MOTOR TRANSPORT ASSOCIATION, MASSACHUSETTS MOTOR TRANSPORTATION, INC., and VERMONT TRUCK & BUS ASSOCIATION, INC.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF FOR *AMICUS CURIAE* TOBACCO CONTROL LEGAL CONSORTIUM, CAMPAIGN FOR TOBACCO-FREE KIDS, AMERICAN LUNG ASSOCIATION, AND AMERICAN CANCER SOCIETY IN SUPPORT OF STATE OF MAINE PETITION FOR A WRIT OF CERTIORARI

INTEREST OF *AMICUS CURIAE* [1]

Four entities with significant interest in and expertise on legal issues surrounding tobacco control in the United States

[1] Counsel for the parties took no part in preparing this brief. No person or entity except listed *amicus curiae* contributed financially to the production of this brief. All parties consented in writing to the submission of this brief.

have joined to submit this brief: the Tobacco Control Legal Consortium, the Campaign for Tobacco-Free Kids, the American Lung Association, and the American Cancer Society. A full description of each *amicus* and its interest in this case is presented at the end of this brief.

ARGUMENT

The enormity of the public health crisis caused by tobacco use in the United States instigates state and local governments to take action to reduce smoking prevalence, especially among youth. Given the profound need for such regulation, federal restraint on state and local government regulation in this area should be narrowly construed. The First Circuit Court of Appeals' overly broad and unreasonable application of the federal preemption provision of the Federal Aviation Administration Authorization Act of 1994 ("FAAAA") not only strikes down an important statute for the State of Maine, it creates an unnecessary shadow over similar efforts to control tobacco distribution in other states. This overreaching unnecessarily impairs state efforts that have been encouraged and condoned by the federal government; reversal is necessary, therefore, *certiorari* is appropriate.

I. TOBACCO USE PRESENTS A PUBLIC HEALTH CRISIS OF UNPRECEDENTED PROPORTIONS.

The dimensions of the public health crisis presented by the use of tobacco in the United States cannot be understated. Tobacco use continues to be the leading preventable cause of death in the United States. *See* U.S. Department of Health and Human Services, *The Health Consequences of Smoking: A Report of the Surgeon General* (2004). Each and every year, tobacco use results in nearly 450,000 deaths and health-related costs of $156 billion. *Id.* The dangers associated with the use of tobacco extend beyond the damage done to the

health of the user; an estimated 60% of non-smokers in the United States have been impacted by secondhand, or environmental, tobacco smoke. *See* U.S. Department of Health and Human Services, *The Health Consequences of Involuntary Exposure to Tobacco Smoke: A Report of the Surgeon General* (2006). The catalog of disease and illness caused by smoking or secondhand smoke exposure continues to expand, as will the continued damage to our economy and public health.

Because of the continued and varied dimensions of this public health dilemma, the Surgeon General of the United States has issued 29 reports detailing the enormous risk posed by tobacco use. *Id.* The most recent report that examines the impact of smoking on primary users concluded that smoking has a harmful impact on nearly every bodily organ. *See* U.S. Department of Health and Human Services, *The Health Consequences of Smoking: A Report of the Surgeon General* (2004). Most important, the report expanded the list of diseases previously identified as being caused by smoking to include abdominal aortic ancurysms, acute myeloid leukemia, cataracts, cervical cancer, kidney cancer, pancreatic cancer, pneumonia, periodontitis, and stomach cancer. *Id.*

There is no doubt that the molecular and cellular damage caused by tobacco is only exacerbated by the onset of tobacco use in early adolescence. *See* U.S. Department of Health and Human Services, *Preventing Tobacco Use Among Young People: A Report of the Surgeon General* (1994). "The [Food & Drug Administration] has amply demonstrated that tobacco use, particularly among children and adolescents, poses perhaps the single most significant threat to public health in the United States." *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 161 (2000). The long-term effects of tobacco use begin in youth smokers; nearly all first-time tobacco use begins prior to high school graduation. The commencement of smoking in adolescence

results in a longer period of exposure and heavier use during adulthood. In an attempt to curtail youth access to tobacco products and thereby reduce youth smoking prevalence, the State of Maine passed legislation regulating the sale of tobacco via the Internet and mail or phone order venues.

II. REDUCING THE AVAILABILITY OF TOBACCO THROUGH RESTRICTIONS ON INTERNET PURCHASES WILL REDUCE TOBACCO USE AMONG MINORS.

Reducing youth access to tobacco products has been an integral component of many state and local governments' efforts toward reducing adolescent tobacco use. *See* U.S. Department of Health and Human Services, *Reducing Tobacco Use: A Report of the Surgeon General* (2000). Indeed, the federal government all but requires states to enact youth tobacco sales restrictions and to enforce those restrictions in some manner. *See* 42 U.S.C. § 300x-26(b)(1) (conditioning state substance abuse funds on achieving certain goals to reduce youth tobacco sales).[2] There is evidence that the best predictor of tobacco experimentation among adolescents is the perception of ready access.[3] Consistent with that evidence is data demonstrating that attempts to limit youth access are generally ineffective when piecemeal; the best

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[2] Interestingly, federal law does not establish a minimum age for the purchase or use of tobacco and, of course, does not establish penalties for retailers who sell tobacco to minors.

[3] *See* United States Department of Health & Human Services, Center for Disease Control and Prevention, *Pathways to Freedom: Winning the Fight Against Tobacco* (1992) (available at http://www.cdc.gov/tobacco/quit/pathways.pdf) (last visited October 9, 2006).

approach is a comprehensive scheme that stresses enforcement of retailer compliance with minor access laws.[4]

The Internet has become an increasingly popular destination for minors seeking to purchase products they cannot buy readily in brick-and-mortar retail establishments. Due to age restrictions and state and local enforcement of those restrictions, tobacco is one such product. Although studies show that Internet purchases comprise a smaller percentage of youth tobacco sales than do traditional commercial sources, there is evidence that minors are aware of the potential of the Internet as a source for illicit tobacco purchases—an avenue that presents fewer obstacles than the typical convenience store, gas station, or vending machine.[5] Internet sales to adolescents will likely increase as retail access becomes an increasingly difficult proposition for minors.[6]

That youth perceive the Internet to be an avenue of ready access to tobacco is validated by recent studies of youth smokers in California and New York. The California study examined tobacco access patterns of California high school sophomores and seniors in the 1999-2000 school year, while the New York study focused on the Western New York ninth grade population.[7] Both studies showed that Internet tobacco

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[4] *See* Frank J. Chaloupka et al., *Prices, Policies and Youth Smoking*, 98 Addiction S1 (May 2003).

[5] *See* National Household Survey on Drug Abuse, *How Youths Get Cigarettes* (Nov. 22, 2002) (available at http://www.oas.samhsa.gov/2k2/YouthCigs/YouthCigs.pdf) (last visited October 9, 2006).

[6] In fact, the sale of cigarettes via the Internet to all consumers is growing. *See* Robert Rubin et al., *Online Tobacco Sales Grow and States Lose*, Forrester Research, Inc. (April 27, 2001) (available at http://www.forrester.com/ER/Research/Brief/Excerpt/0,1317,12253,00.html) (last visited October 17, 2006).

[7] *See* Sara M. Abrams et al., *Internet cigarette purchasing among ninth-grade students in Western New York*, 36 Preventative Medicine 731

purchases accounted for between 2.0% to 2.5% of tobacco purchases by study participants.[8] In the New York study, proof of age was requested of only 30% of Internet purchasers, and youth aged 14 and under were "significantly more likely to report using the Internet to purchase cigarettes."[9] Of the participants in the California study who reported ever having used the Internet to attempt to purchase cigarettes, 32% had made their most recent purchase through that medium.[10]

As savvy "cyber-shoppers," adolescents will likely turn to the Internet more frequently as a source of tobacco. Participants in the New York study indicated that 9% of current youth smokers intended to purchase cigarettes over the Internet within the year following the study.[11] As youth access to the Internet grows—at home or at school, through laptops or cell phones—minors will more readily and more frequently circumvent state and local sales restrictions by purchasing online. And online retailers willing to sell to kids will continue to provide that opportunity. A 2003 study of the proportion of Internet cigarette vendors that would sell cigarettes to minors resulted in overwhelming evidence that minors face little or no difficulty in purchasing cigarettes online.[12] In that study, Internet cigarette vendors sold cigarettes to minors in 92% of attempted purchases.[13] Of the successful purchases made by adolescents, the age of the

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(2003); Jennifer B. Unger et al., *Are adolescents attempting to buy cigarettes on the internet?*, 10 Tobacco Control 360 (2001).

[8] *See* Abrams, *supra* note 7; Unger *supra* note 7.

[9] *See* Abrams, *supra* note 7, at 732.

[10] *See* Unger, *supra* note 7, at 361.

[11] *See* Abrams, *supra* note 7, at 731.

[12] *See* Kurt M. Ribisl et al., *Brief Report: Internet Sales of Cigarettes to Minors*, 290 Journal of American Medicine 10 (Sept. 10, 2003).

[13] *Id.*

purchaser was never verified by the vendor.[14] Most disturbing, vendors included complimentary cigarette packs and samples, as well as promotional items and ordering information that the vendor suggested should be passed on to new customers.[15]

The need for regulation and enforcement of Internet tobacco sales is a clear imperative if the public health crisis that tobacco use represents is to be managed and eliminated; and the states are willing and able to impose appropriate restrictions like those in Maine's statute. The long-term effects of tobacco use are made more profound when tobacco use begins in the youth population. The danger that the Internet poses as a new and anonymous source for minors to purchase tobacco products in contravention of legal age restrictions cannot be ignored, and must be addressed. The State of Maine recognized this imperative when enacting the tobacco delivery law at issue here.

III. THE FIRST CIRCUIT'S DECISION UNREASONABLY RESTRICTS MAINE AND OTHER STATES FROM CONTROLLING YOUTH ACCESS TO TOBACCO.

The First Circuit Court of Appeals ruled that Maine's tobacco delivery law[16] was preempted by the FAAAA. The decision severely and unnecessarily restricts Maine from regulating direct Internet or telephone sales of tobacco. Further, the decision threatens laws in other states that regulate the delivery of tobacco and other dangerous

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[14] *Id.*

[15] *Id.* In addition, because most Internet sellers are operating outside the tax scheme, *see* Rubin, *supra* note 6, they are able to offer lower-priced cigarettes, a further enticement to price-sensitive consumers like kids.

[16] Me. Pub. L. 2003, c. 444; *see also* 2003 Me. Legis. Serv. Ch. 444 (West).

substances. This Court should grant *certiorari* and reverse the First Circuit, reinstating state and local power in this area.

A. Application of the First Circuit's Decision Nationwide Will Affect Laws Similar To Maine's Across the Country.

Maine's tobacco delivery law imposes three requirements on tobacco retailers. First, the law requires that retailers selling tobacco over the Internet obtain age verification before selling tobacco to a consumer. *See* Me. Rev. Stat. Ann. tit. 22, § 1555-C(1) (West 2004). Second, the package in which the tobacco is sent must be clearly marked and identifiable as containing a tobacco product. *See id.* at § 1555-C(3)(B). Third, the retailer must choose a delivery service (or carrier) that provides age verification and signature services at the end destination. The law allows for the punishment of a carrier who knowingly transports a package in violation of the Maine delivery law. Carriers "may not knowingly transport . . . a tobacco product purchased from a person who is not licensed as a tobacco retailer in this State . . . ." *Id.* § 1555-D. Thus, the law provides a mechanism by which Maine can ensure that tobacco products purchased through the Internet or telephone do not reach minors and are not being sold in the state by unlicensed tobacco retailers.

The FAAAA[17] was passed by Congress in 1994 to prevent states from engaging in economic regulation that would eliminate non-uniform air and motor carrier operations. *See* H.R. Conf. Rep. No. 103-677, at 85-88 (1994), *reprinted in* 1994 U.S.C.C.A.N. 1715, 1758-60. The first relevant provision provides that a state may not enact a law "related to a price, route, or service of an air carrier . . . when such carrier is transporting property by aircraft or by motor

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[17] Pub. L. No. 103-305, § 601, 108 Stat. 1569, 1605 (1994).

vehicle." Pub. L. No. 103-305, § 601(b)(1), codified at 49 U.S.C. § 41713(b)(4)(A). Second, the FAAAA prevents states from passing a law "related to a price, route, or service of any motor carrier . . . with respect to the transportation of property." Pub. L. No. 103-305, § 601(c), originally codified at 49 U.S.C. § 11501(h)(1), now codified at 49 U.S.C. § 14501(c)(1). Finally, Congress exempted from both of these provisions the "safety regulatory authority of a State with respect to motor vehicles," including regulation of hazardous cargo, insurance requirements, or household goods. Pub. L. No. 103-305, § 601(b)(1), codified at 49 U.S.C. § 41713(b)(4)(B).[18]

Congress intended to preempt state regulation of motor carriers only when such regulation was designed to control or manipulate carrier costs, not when such regulation imposes requirements only on non-carrier third parties, such as Internet tobacco vendors. Tobacco regulation designed to protect the public health, particularly the youth access restriction at issue here, does not fall within the preemption provision. Yet the First Circuit interpreted the "related to" language of the FAAAA broadly, resulting in the preemption of Maine's tobacco delivery law. *See N.H. Motor Transp. Ass'n v. Rowe*, 448 F.3d 66, 75-78 (1st Cir. 2006). According to the First Circuit, by requiring tobacco retailers to choose a carrier that provides age verification and signature services, the Maine law indirectly regulates carriers by potentially impacting the timeliness of deliveries. *Id.* at 79-80. The court exaggerates this impact, expressing concern that carriers

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[18] Congress also exempted certain "State standard transportation practices" dealing with bills of lading and other credit rules. Pub. L. No. 103-305, § 601(c), originally codified at 49 U.S.C. § 11501(h)(3), now codified at 49 U.S.C. § 14501(c)(3). Later, Congress added an additional exemption for state regulation of tow rates. Interstate Commerce Commission Termination Act of 1995, Pub. L. No. 104-88, § 103, 109 Stat. 803, 899, codified at 49 U.S.C. § 14501(c)(2)(C).

will be required to make multiple delivery attempts, acquire a customer signature and examine customer identification. *Id.* at 79. However, even before the passage of Maine's tobacco delivery law, carriers such as United Parcel Service ("UPS") provided such services on any package if the shipper paid a nominal fee. *Id.* at 70. Nothing in Maine law requires nor prohibits carriers from offering these services; the law merely requires that shippers contract for such services when shipping tobacco products. The court admits to interpreting the preemption provision to have a "broad reach." *Id.* at 78-79. Indeed, the reach is so broad as to be illogical and certainly, in context, unreasonable.

Further, the First Circuit concluded that the second part of the Maine tobacco delivery law, the package labeling requirement, was preempted to the extent that it requires carriers to change "uniform package-processing procedures" to inspect all packages for tobacco markings and to segregate such packages. *Id.* at 81-82. As with the delivery requirements, the package-marking requirement of the Maine law is imposed not on carriers but on shippers, the carriers' customers. Nevertheless, the First Circuit speculated about the potential impact the requirement on shippers may have on carriers and found that potential impact sufficient to invoke the FAAAA preemption provision. Specifically, the court found that any deviation from the current package inspection process—a process that must vary by carrier, package size, type of delivery requested (*i.e.*, overnight, second-day, signature requirement, etc.), region of the country, stability of the package contents, and more—constitutes an unlawful infringement on carriers if adopted by a state or local government. Carriers such as UPS, however, already check packages for certain markings in many circumstances and had already adopted specific practices relating to packages

containing tobacco products.[19] In fact, in settlement of an enforcement action by the New York Attorney General, UPS agreed to "look for indications that a package contains cigarettes" before making any delivery. *Id.* at 73.[20] Thus, the First Circuit's conclusion that a package-labeling requirement presents an onerous, or even more than negligible, burden on carriers is without factual or logical support. That the court felt the need to articulate such a tenuous and unfounded basis for its decision demonstrates the inaccuracy of the court's ultimate decision on the preemption question.[21]

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[19] The highly computerized nature of the common carrier business cuts against the speculation that the Maine labeling requirement would impose a burden on carriers. Such a high-tech business could readily adapt to this requirement. *See* Thomas Friedman, THE WORLD IS FLAT: A BRIEF HISTORY OF THE TWENTY-FIRST CENTURY, *Flattener #8, Insourcing, What the Guys in the Funny Brown Shorts are Really Doing* 141-50 (2005) (explaining that if the Customs Service were to ask UPS to identify a package coming from a particular country and shipped by a person bearing a certain first or last name, UPS could readily do so—"When the package arrives for sorting, the UPS computers will then automatically route the package to a customs officer in the UPS hub. A computerized arm will literally slide it off the conveyor belt and dump it into a bin for a closer look. It makes the inspection process more efficient and does not interrupt the general flow of packages."). UPS takes pride in their high-tech system. *See* www.ups.com for public information about the company's process.

[20] A copy of the agreement can be found at http://www.oag.state.ny.us/press/2005/oct/9tiupsaodfinal.oct.pdf (last visited October 17, 2006). As that agreement details, UPS had already adopted certain practices regarding the shipment of tobacco products that deviate from the "uniform package-processing procedures." Similar settlements were reached with FedEx, *see* http://www.oag.state.ny.us/press/2006/feb/FedEx%20-%20Executed%20AOC.pdf (last visited October 17, 2006), and DHL, *see* http://www.oag.state.ny.us/press/2005/jul/dhlaogfinal.pdf (last visited October 17, 2006).

[21] Maine also has laws that restrict transportation of other dangerous products; those laws may be affected by the First Circuit's decision. *See, e.g.*, Me. Rev. Stat. Ann. tit. 28-A, §§ 2073, 2077 (liquor transportation);

Moreover, the First Circuit's unreasonably broad reading of the "related to" language of the FAAAA preemption provision threatens to undo the proper balance of state and federal authority in this area of public health. Historically, states have regulated youth access to tobacco by passing and enforcing laws designed to minimize tobacco sales and free distribution to youth. The federal government has not only condoned, but encouraged, such efforts.[22] And while Congress passed a law imposing reporting requirements on interstate shippers of tobacco products, 15 U.S.C §§ 375 to 378 (the "Jenkins Act"), that law essentially imposes enforcement responsibility on the states.[23] This federal deference to

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Me. Rev. Stat. Ann. tit. 8, §§ 221 *et seq.*, (sale or transportation of fireworks); Me. Rev. Stat. Ann. tit. 17-A, § 1001(a)(B) (sale or transport of explosives).

[22] *See* 42 U.S.C. § 300x-26(b)(1) (requiring states to enforce youth access laws at the retail level); *see also* Centers for Disease Control and Prevention, *Best Practices for Comprehensive Tobacco Control Programs,* Atlanta GA: U.S. Department of Health and Human Services, Centers for Disease Control and Prevention, National Center for Chronic Disease Prevention and Health Promotion, Office on Smoking and Health (August 1999) (available at http://www.cdc.gov/tobacco/bestprac.htm) (last visited October 17, 2006). That the federal government has left to the states the responsibility for controlling youth access to tobacco is further demonstrated by the fact that the federal government has not established a minimum age for the use or possession of tobacco and, therefore, has no enforcement scheme to control youth access.

[23] Recognizing that it is state governments interested in regulating tobacco sales, the Jenkins Act requires that tobacco sellers who ship cigarettes across state lines report sales to the appropriate state tax authority. 15 U.S.C. §§ 375-378. It is fair to say that the federal government has invested no resources in enforcement of the Jenkins Act. *See* U.S. General Accounting Office, Report to Congressional Requestors, *Internet Cigarette Sales: Giving ATF Investigative Authority May Improve Reporting and Enforcement* (August 2002) (available at www.gao.gov/new.items/d20743.pdf) (last visited October 20, 2006). As this report explains, state governments have been active in indirect enforcement of

state government is subverted by the broad application of federal preemption curtailing the states' ability to control youth access to tobacco over the Internet. Nationwide application of the First Circuit's decision would be a blow to the states' ability to regulate Internet or mail-order tobacco sales, cutting against existing federal-state policy on tobacco control and allowing a real threat to the public health with respect to youth access to tobacco products. This Court has recognized this threat in the past, *see Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 161 (2000), and, in the context of alcohol, has approved of state laws requiring adult signature verification and labeling instructions on packages. *Granholm v. Heald*, 544 U.S. 460, 490-91 (2005).

At least ten other states have passed laws similar to Maine's, requiring a retailer to use a carrier with age and signature verification upon delivery of tobacco products.[24] Those states include Virginia and Utah. Virginia's tobacco delivery law requires the retailer to use a delivery service that provides signature acceptance of delivery and proof of age through "a valid, government-issued identification" at delivery time. Va. Code Ann. § 18.2-246.10(2) (West 2004). Similarly, Utah allows mail-order tobacco sales if the retailer requires a "postal authority or other common carrier to," among other things, obtain a signature and verify the age of the person taking the delivery. Utah Code Ann. § 76-10-

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the Jenkins Act, at least attempting to have an impact on Internet and mail order tobacco sales, while the federal government has taken no action.

[24] *See, e.g.*, Ariz. Rev. Stat. Ann. § 42-3225(A)(2) (West 2004); Del. Code. Ann. tit. 30, § 5365(a)(2) (West 2004); Ind. Code Ann. § 24-3-5-5(a) (West 2004); La. Rev. Stat. Ann. § 47:874(A)(2) (West 2004); Okla. Stat. Ann. tit. 68, § 317.4(A)(2) (West 2004); Or. Rev. Stat. Ann. § 323.718(1)(b) (West 2004); Tex. Health & Safety Code Ann. § 161.455(a)(2) (Vernon 2004); Utah Code Ann. § 76-10-105.1(3)(a) (West 2004); Va. Code Ann. § 18.2-246.10(2) (West 2004); W. Va. Code Ann. § 16-9E-4(a)(2) (West 2004).

105.1 (West 2004). Such provisions would be preempted under the First Circuit's interpretation of the FAAAA's preemption provisions. Many other states regulate youth access to tobacco via direct Internet delivery sales either by banning such sales[25] or by regulating retailers or carriers in some fashion[26] or both. Congress could not have intended to preempt these specific tobacco delivery laws through the general language of the FAAAA. The First Circuit's broad interpretation of the preemption language in the FAAAA threatens such state public health regulation.

Parental ability to control teenagers' Internet usage is minimal and a child can easily falsify his or her age online or over the telephone. By requiring retailers to choose carriers with age and adult signature verification, Maine and other states are utilizing an already existing apparatus, through delivery services such as UPS, to regulate the sale of tobacco to minors. Yet the First Circuit's decision will leave states with no practical means to prevent youth tobacco purchases over the Internet and telephone. Congress could not have intended this result when enacting the FAAAA as an economic regulation protecting common carriers.

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[25] *See, e.g.*, N.Y. Pub. Health Law § 1399-ll (McKinney 2004); Md. Code Ann., Bus. Reg. § 16-223 (2004).

[26] *See, e.g.*, Alaska Stat. § 43.50.105 (Michie 2004); Cal. Bus. & Prof. Code § 22963 (West 2004); Conn. Gen. Stat. Ann. § 12-285c (West 2004); Idaho Code Ann. §§ 39-5701 to -5718; 720 Ill. Comp. Stat. Ann. §§ 678/5, -/10, -/99 (West 2004); Kan. Stat. Ann. § 79-3333 (2004); Mich. Comp. Laws Ann. § 205.431 (West 2004); Mo. Ann. Stat. §§ 407.925 to .932 (West 2004); Nev. Rev. Stat. Ann. § 202.24935 (West 2004); R.I. Gen. Laws. §§ 11-9-13.11 to -13.19 (2004); Tenn. Code Ann. § 39-17-1504(d) (West 2004); Wash. Rev. Code Ann. §§ 70.155.010, -.105, -.110 (West 2004).

B. States Should Be Allowed To Regulate Where the Federal Government Refuses To.

Both Congress and the judiciary acknowledge that states have the primary role in preventing youth access to tobacco. Congress, through the power to withhold spending from the states, conditions certain block grants for substance abuse on whether a state has made efforts to enforce under-18 tobacco laws. *See* 42 U.S.C. § 300x-26(b)(1) (providing that states will enforce their tobacco laws "in a manner that can reasonably be expected to reduce the extent to which tobacco products are available to individuals under the age of 18"). States are in the best position to implement and enforce such tobacco laws, and Congress indirectly demands as much from the states by conditioning federal funds on limited youth access.[27] An overly broad interpretation of federal preemption in the FAAAA runs counter to the federal mandate that states take action to reduce youth access to tobacco.

This Court and the Fourth Circuit have recognized the importance of the states' authority in this area. This Court recognized "established congressional policy that supports" state regulation of tobacco sales. *See Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 552 (2001). The Fourth Circuit noted the "clear congressional intent that States exercise their traditional police powers and take a primary role in attacking the problem of youth access to tobacco products." *Brown & Williamson Tobacco Corp. v. Food & Drug Admin.*, 153 F.3d 155, 175 (4th Cir. 1998), *aff'd*, 529 U.S. 120 (2000). To allow an unnecessary and overbroad interpretation of an unrelated federal statute to interfere with this long-standing

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[27] Such federal demand also takes form as the "encouragement" of best practices at the state level that include comprehensive laws to address youth access to tobacco, *see* supra, note 22, and by requiring interstate shippers to report sales to state government authorities, *see* supra note 23 and accompanying text.

federal-state practice would do a disservice to significant public health efforts at controlling youth access to tobacco.

STATEMENT OF INTEREST OF *AMICUS CURIAE*

The Tobacco Control Legal Consortium ("TCLC") is a national network of legal centers providing technical assistance to public officials, health professionals, and advocates in addressing legal issues related to tobacco and health, and supporting public policies that will reduce the harm caused by tobacco use in the United States. TCLC grew out of collaboration among specialized legal resource centers serving six states, and is supported by national advocacy organizations, voluntary health organizations, and others.[28] In addition, TCLC prepares legal briefs as *amicus curiae* in cases in which its experience and expertise may assist courts in resolving tobacco-related legal issues of national significance. TCLC has submitted *amicus* briefs in recent cases before the U.S. Supreme Court; the Supreme Courts of California, Delaware, Florida, Kentucky, Montana, and Washington; and the U.S. District Court for the District of Columbia.

Amicus the Campaign for Tobacco-Free Kids, a nonprofit corporation based in Washington, D.C., works to educate the public and policymakers about effective public and private

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[28] TCLC's coordinating office is located at the Tobacco Law Center of the William Mitchell College of Law in St. Paul, Minnesota. Other affiliated legal centers include the Technical Assistance Legal Center (TALC) at the Public Health Institute of California, in Oakland, California; the Legal Resource Center for Tobacco Regulation, Litigation & Advocacy (TRC) at the University of Maryland School of Law in Baltimore, Maryland; the Tobacco Control Resource Center (TCRC) at Northeastern University School of Law in Boston, Massachusetts; the Smoke-Free Environments Law Project (SFELP) at the Center for Social Gerontology in Ann Arbor, Michigan; the Tobacco Control Policy and Legal Resource Center at New Jersey GASP in Summit, New Jersey; and the Tobacco Public Policy Center at Capital University Law School in Columbus, Ohio.

sector policies to prevent and reduce tobacco use and its harms, and to advocate for the adoption of such policies, with a special focus on preventing and reducing tobacco use among youth. The Campaign for Tobacco-Free Kids has over 100 member organizations, including health, civic, corporate, youth, and religious groups dedicated to reducing tobacco use and its harms, especially among children. Among other activities, the Campaign has done education and advocacy work relating to Internet and mail order sales of tobacco products to kids articulating why such sales are harmful to state efforts to: 1) collect applicable taxes; 2) keep tobacco prices at high rates to discourage smoking, especially in youth; and 3) diminish the ready access to tobacco products for all consumers.

Amicus the American Lung Association ("ALA") is one of the nation's oldest voluntary health organizations, with volunteers and affiliates in all 50 states, the District of Columbia, Puerto Rico, and the Virgin Islands. ALA has nearly 400,000 volunteers. Since cigarette smoking is a major cause of chronic obstructive lung disease, ALA has long been active in research, education, and public policy advocacy on the adverse health effects of tobacco products. ALA has advocated for the regulation of tobacco products for more than two decades.

Amicus the American Cancer Society, Inc. ("ACS") has over three million volunteers nationwide, including 50,000 physicians. The organization's mission is to eliminate cancer as a major health problem by preventing cancer, saving lives, and diminishing suffering from cancer, through research, education, advocacy, and service. The organization was founded in 1913, and since that time has conducted ground-breaking research in identifying the use of tobacco products as a major cause of cancer, and educating the public about its deadly effects. ACS strongly advocates for tobacco regu-

lation at all levels of government, including trying to ensure that children do not have access to this lethal product.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of *certiorari*.

Respectfully submitted,

MATTHEW MYERS *
Campaign for Tobacco-Free Kids
1400 Eye Street
Suite 1200
Washington, D.C. 20005
(202) 296-5469

* Counsel of Record

Counsel for Amicus Curiae

No. 06-457

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IN THE

Supreme Court of the United States

G. STEVEN ROWE, ATTORNEY GENERAL OF MAINE,
Petitioner,

v.

NEW HAMPSHIRE MOTOR TRANSPORT ASSOCIATION, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF OF WINE AND SPIRITS WHOLESALERS OF AMERICA, INC. AS *AMICUS CURIAE* IN SUPPORT OF NEITHER PARTY

CRAIG WOLF
JOANNE MOAK
KENT G. HUNTINGTON
WINE AND SPIRITS WHOLESALERS OF AMERICA, INC.
805 Fifteenth Street, N.W.
Suite 430
Washington, D.C. 20005
(202) 371-9792

CARTER G. PHILLIPS*
JACQUELINE G. COOPER
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

STEVEN A. ELLIS
SIDLEY AUSTIN LLP
555 West Fifth Street
Los Angeles, CA 90013
(213) 896-6000

Counsel for Amicus Curiae Wine and Spirits Wholesalers of America, Inc.

*Counsel of Record

August 23, 2007

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

QUESTION PRESENTED

Amicus will address the following question: Whether the standards for preemption under the Federal Aviation Administration Authorization Act of 1994 ("FAAAA") that apply to state restrictions on the delivery of tobacco products necessarily apply in precisely the same way to state restrictions on the delivery of products containing alcohol.

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INTEREST OF *AMICUS CURIAE*[1]

Wine and Spirits Wholesalers of America, Inc. ("WSWA") is a national trade organization and the voice of the wholesale branch of the wine and spirits industry. Founded in 1943, WSWA represents nearly 360 companies in all 50 states and the District of Columbia that hold state licenses to act as wine and/or spirits wholesalers and/or brokers. WSWA's members distribute more than 80% of all wine and spirits sold at wholesale in the United States. WSWA has previously filed *amicus* briefs in other cases before this Court that involved issues concerning the wine and spirits industry, including *Granholm* v. *Heald*, 544 U.S. 460 (2005).

WSWA, as a trade association for wine and spirits distributors and/or brokers in every State and the District of Columbia, has a fundamental interest in issues concerning federal and state regulation of the shipment and delivery of products, such as alcohol, that potentially pose a danger to certain segments of the population. Accordingly, WSWA is concerned about the proper boundaries between federal and state regulation of such products. The issue presented in this case – whether the express preemption provisions in the Federal Aviation Administration Authorization Act of 1994 ("FAAAA") preempt portions of Maine's statute regulating the shipment and delivery of tobacco products – is of vital concern to WSWA and its members because alcohol products raise related but legally separate and distinct regulatory issues for both state and federal officials.

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[1] Pursuant to this Court's Rule 37.6, *amicus curiae* states that no counsel for any party authored this brief in whole or in part, and no person or entity other than *amicus curiae* made a monetary contribution to the preparation or submission of the brief.

Pursuant to Rule 37.3, *amicus curiae* states that petitioner and respondents have consented to the filing of this brief. *Amicus curiae* has filed letters with the Clerk of the Court reflecting the consent of the parties.

This brief does not propose to address the specific statutory construction issue presented by the State of Maine. WSWA does not have a view on that question, which will be briefed ably by others. Instead, this brief focuses on two points. First, strong and effective State regulation of the shipment and delivery of alcohol is critically important and unquestionably in the public interest. Second, state laws governing the shipment and delivery of alcohol are fundamentally different from state laws governing the shipment and delivery of tobacco and other products that pose potential health risks because of the States' plenary authority under the Twenty-first Amendment to regulate the distribution and transportation of alcohol. See U.S. Const. amend. XXI, § 2. Accordingly, however the Court decides the federal preemption issue presented in this case, it should recognize and make clear in its decision that it is not deciding any issue concerning federal preemption of state laws governing the shipment and delivery of alcohol, either under the FAAAA or any other federal law. Those issues are not presented here and the Court should await an appropriate case in which to decide them.

SUMMARY OF ARGUMENT

The States have a strong and legitimate interest in enacting and enforcing laws that restrict underage access to alcohol. Despite the existence of minimum drinking age statutes in all 50 states, studies indicate that 70 percent or more of high school seniors have had alcoholic drinks, and underage drinking continues to be a prevalent problem. The consequences of underage drinking are devastating: there is a strong correlation between underage drinking and drunk driving deaths and serious injuries, other accidental injuries, violence, vandalism, suicide, poor school performance, risky sexual behavior, and adult alcoholism. It is the States that have primary responsibility for combating underage drinking, as reflected in the Twenty-first Amendment, congressional enactments, and prior decisions of this Court.

In deciding this case, the Court should not decide any issue concerning federal preemption of state laws governing the shipment and delivery of alcohol, either under the FAAAA or any other federal law. Alcohol is fundamentally different from other commodities because the Twenty-first Amendment grants the States plenary authority to regulate its distribution and transportation. Accordingly, the Court has held that the Twenty-first Amendment necessarily constrains Congress' power to enact laws that regulate the distribution and transportation of alcohol. In cases addressing whether federal laws preempt state laws governing alcohol, the Court has held that courts must specifically consider and analyze the State's interests under the Twenty-first Amendment that are served by the particular law at issue. Because state laws that govern the distribution of alcohol products raise unique and fact-specific Twenty-first Amendment issues, and no such law is at issue here, the Court should make clear in its decision that such state laws are not encompassed by its ruling.

ARGUMENT

I. THE STATES HAVE A STRONG INTEREST IN REGULATING THE DIRECT SHIPMENT AND DELIVERY OF ALCOHOL.

The illegal use of alcohol by young people is a serious problem in the United States. "More young people drink alcohol than smoke tobacco or use marijuana." Nat'l Acad. of Scis., *Reducing Underage Drinking: A Collective Responsibility* 35 (R. Bonnie & M. O'Connell eds., 2004) (the "NAS Report"); see also Teenage Research Unlimited, *Research Findings: Underage Alcohol Access & Consumption* 16 (2006), *available at* http://www.pointclickdrink.com/news/TRUSurvey.pdf (the "TRU Report").

According to a report released in 2004 by the National Academy of Sciences' Institute of Medicine:

> Alcohol use by young people is dangerous, not only because of the risks associated with acute impairment, but also because of the threat to their long-term development and well-being. Traffic crashes are perhaps the most visible of these dangers, with alcohol being implicated in nearly one-third of youth traffic fatalities. Underage alcohol use is also associated with violence, suicide, educational failure, and other problem behaviors. All of these problems are magnified by early onset of teen drinking: the younger the drinker, the worse the problem. Moreover, frequent heavy drinking by young adolescents can lead to mild brain damage. The social cost of underage drinking has been estimated at $53 billion [annually] including $19 billion from traffic crashes and $29 billion from violent crime.

NAS Report, at 1. "[D]rinking drivers under age 21 are involved in fatal crashes at twice the rate of adult drivers," and underage drinking is also "strongly correlated with violence, risky sexual behavior, poor school performance, suicide, and other harmful behaviors." *Id.* at 59; see also, *e.g.*, *id.* at 13 ("Alcohol use by children, adolescents, and young adults under the legal drinking age of 21 produces human tragedies with alarming regularity."). "[O]n college campuses 95 percent of all violent crime and 90 percent of college rapes involve the use of alcohol by the assailant, victim, or both." *Id.* at 61.

Despite minimum drinking age laws in all 50 States, young people under age 21 continue to find ways to gain access to alcohol. Approximately 80 percent of high school seniors report that they have had at least one alcoholic drink in their lives, and more than 70 percent have had a drink in the past year. *Id.* at 14, 35, 44-45; see also TRU Report, at 16 (74 percent of those aged 18-20 report having had "more than a sip" of alcohol). Almost all high school seniors (94.7 percent in one survey cited in the NAS Report) state that it is "'fairly'" or "'very'" easy to get alcohol. NAS Report, at 20.

Young people obtain alcohol in a variety of different ways. *Id.* at 158-84. One significant and growing method is through the Internet or other methods of home delivery. *Id.* at 174. As many as 10 percent of young people currently report obtaining alcohol in this manner. *Id.*; see also TRU Report, at 14 (twelve percent of those surveyed report knowing a friend who has purchased alcohol online). It is simply inconceivable that this percentage will not grow significantly as more teens discover the potential ease with which alcohol can be obtained by use of the Internet.

The link between underage drinking and access to the Internet is highlighted in a 2005 report from the National Clearinghouse on Alcohol and Drug Information (NCADI), part of the U.S. Department of Health and Human Services' Substance Abuse and Mental Health Services Administration. The NCADI report warned that "[m]ore than 30 million children in the United States under 18 currently use the Internet" and "80 percent of 12th grade students routinely go online," where the Internet offers minors easy access to alcohol. *Internet Offers Minors Easy Access to Alcohol and Illicit Drugs* (July 20, 2005), http://ncadi.samhsa.gov/newsroom/rep/2005/239.aspx. The NCADI report explained:

> The Internet connects teenagers to their friends and the world outside their homes. What parents may not realize is that their kids could be connecting to alcohol and illicit drugs as well.
>
> An increasing number of teens have credit or debit cards, providing an easy and anonymous way to order alcohol or drugs off the Web. The Internet acts as a general store where computer users can get hold of almost anything such as:
>
> • Beer, wine, and hard liquor – including tequila and vodka – without verification of age.
>
> ....

> Underage college students can order alcohol off the Internet and have it delivered right to their dorm door – with no questions asked. Teenagers don't need a fake ID to purchase alcohol on the Internet and they don't face the danger of getting caught at a store with a fake ID.

Id.

Both practically and legally, it is the States that have the primary responsibility to combat underage drinking. Indeed, State law enforcement officials have become more aware of this problem in recent years, and have been working to develop tools to fight the ability of underage persons to obtain alcohol through the Internet, phone orders, and other methods of direct delivery, for several years. See, *e.g.*, *Delivery May Have Broken Law*, Daily Iowan, Mar. 19, 2007, *available at* http://media.www.dailyiowan.com/media/storage/paper599/news/2007/03/19/Metro/Delivery.May.Have.Broken.Law-2779624.shtml (describing delivery of alcohol to college students without any attempt to verify age of recipient); Internet Retailer, Massachusetts Charges Four Online Alcohol Merchants With Selling to Minors (June 15, 2004), http://www.internetretailer.com/internet/marketing-conference/57375-massachusetts-charges-four-online-alcohol-merchants-selling-minors.html (describing sting operation by Massachusetts Attorney General's office in which UPS and other carriers, along with a number of different retailers and producers of alcohol, were cited for illegal sales to minors); Fed. Trade Comm'n, Workshop (Oct. 8, 2002) (Remarks of Michigan Assistant Attorney General Irene M. Mead), http://www.ftc.gov/opp/ecommerce/anticompetitive/panel/mead.htm (describing sting operations and other enforcement efforts by Michigan Attorney General's office dating back to 1999 that intercepted alcohol shipments to minors through UPS from various retailers and producers).

The primacy of the States in combating the abuse of alcohol generally, and underage access to alcohol specifically is rooted in Section 2 of the Twenty-first Amendment, discussed

in more detail below. The fundamental role of the States has also been recognized by Congress, by other observers, and by this Court.

In 2006, Congress enacted the Sober Truth on Preventing Underage Drinking Act (the "STOP" Act), Pub. L. No. 109-422, 120 Stat. 2890 (2006), and expressed its view that the States should bear significant and primary responsibility for combating youth access to alcohol. In its "Sense of Congress" statement in that Act, Congress declared:

> Alcohol is a unique product and should be regulated differently than other products by the States and Federal Government. States have primary authority to regulate alcohol distribution and sale, and the Federal Government should support and supplement these State efforts. *States also have a responsibility to fight youth access to alcohol and reduce underage drinking.* Continued State regulation and licensing of the manufacture, importation, sale, distribution, transportation and storage of alcoholic beverages are clearly in the public interest and are critical to promoting responsible consumption [and] preventing illegal access to alcohol by persons under 21 years of age ....

See 42 U.S.C. § 290bb-25b(b)(7) (emphasis added). Moreover, in a list of potential performance measures for state regulatory schemes, Congress specifically identified the issue of "[w]hether or not the State has policies and regulations with regard to direct sales to consumers *and home delivery of alcoholic beverages*." *Id.* § 290bb-25b(c)(2)(B)(ii)(V) (emphasis added).

The NAS Report from 2004 reflects a similar view. In connection with its detailed study of the issue, the NAS offered a set of comprehensive proposals to reduce underage drinking, recommending that states regulate Internet sales and home delivery "to reduce the likelihood of sales to underage purchasers." NAS Report, at 174 (emphasis omitted).

Specifically, the NAS recommended that the States enact laws that "require all packages for delivery containing alcohol to be clearly labeled as such" and "require persons who deliver alcohol to record the recipient's age identification information from a valid government-issued document (such as a driver's license or ID card)." *Id.* at 174-75 (emphasis omitted).

And, indeed, this Court itself has recognized the critically important role of the States in restricting the access of underage persons to alcohol. In *Granholm* v. *Heald*, 544 U.S. 460, 489 (2005), the Court expressly acknowledged that the States have a legitimate interest in enforcing their laws against underage drinking. See also *North Dakota* v. *United States*, 495 U.S. 423, 432 (1990) (plurality opinion) (recognizing that the State's regulation of alcohol distribution was supported by its "unquestionably legitimate" interests in "promoting temperance, ensuring orderly market conditions, and raising revenue"). Although the Court invalidated the particular regulation of direct sales at issue in *Granholm* because it discriminated against out-of-state producers, the Court noted the availability of less restrictive, non-discriminatory alternatives:

> For example, the Model Direct Shipping Bill developed by the National Conference of State Legislatures requires an adult signature on delivery and a label so instructing on each package [containing alcohol].

544 U.S. at 491. Many states have enacted laws, similar to the Model Direct Shipping Bill, that require labeling on packages containing alcohol, the signature of an adult over the age of 21 upon delivery, or both.[2]

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[2] *E.g.*, Ariz. Rev. Stat. § 4-203.04(J)(3); Cal. Bus. & Prof. Code §§ 23661.2, 23661.3(b)(2)-(3); Colo. Rev. Stat. § 12-47-104(3); Conn. Gen. Stat. § 30-19f(c); Del. Code Ann. tit. 4, § 526(a)(6)-(7); Haw. Rev. Stat. § 281-33.6(b)(1)-(2); Idaho Code Ann. § 23-1309A(8)-(9); 235 Ill. Comp. Stat. 5/6-29(b); Ind. Code § 7.1-3-26-9(2)(B) & (D); Mich. Comp.

In sum, state regulation of the delivery of alcoholic beverages has a unique status under the Constitution, federal statutory law, and this Court's decisions. Accordingly, whatever rules might apply to the relationship between federal and state law regulating other products which may be subject to abuse by minors do not necessarily apply of their own force to the distribution of alcohol.

II. THE COURT SHOULD NOT DECIDE IN THIS CASE ANY ISSUE CONCERNING FEDERAL PREEMPTION OF STATE LAWS GOVERNING THE SHIPMENT AND DELIVERY OF ALCOHOL.

Throughout their briefs at the petition stage, the parties and their *amici* suggest that the preemption issue in this case extends beyond Maine's law regulating the shipment and delivery of tobacco and encompasses laws regulating the shipment and delivery of numerous other potentially dangerous products and substances, and they specifically identify alcohol. See, *e.g.*, Pet. 16 ("The decision [below], thus, preempts countless state laws that have existed for decades, regulating the sale and delivery of substances, from tobacco to weapons to alcohol."); *id.* at 24 (asserting that the effect of the decision below "is to eliminate any state ability to control how retailers deliver tobacco, alcohol and other substances"); Brief *Amicus Curiae* Of The State of California And 35 Other States In Support Of The Petition ("States' Br.") at 2 (asserting that the decision below "not only threatens other states' tobacco laws, but also threatens state

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Laws § 436.1203(3)(f); Minn. Stat. § 340A.417(b); Mo. Rev. Stat. § 311.462(2); N.H. Rev. Stat. Ann. § 178:27(II); N.Y. Alco. Bev. Cont. Law § 79-c(3)(b) & (e)(i); N.C. Gen. Stat. § 18B-1001.1(c); 2007 Or. Laws ch. 854 (to be codified at Or. Rev. Stat. § 471.229(4) & (5)(b) (eff. Jan. 1, 2008)); S.C. Code Ann. § 61-4-747(C)(2); Tex. Alco. Bev. Code Ann. § 16.09(b)(1) & (d); Vt. Stat. Ann. tit. 7, § 66(d)(3)(B) & (e)(1); Va. Code Ann. § 4.1-209.1(C); W. Va. Code § 60-8-6(b); Wyo. Stat. Ann. § 12-2-204(d)(iii) & (iv).

restrictions on the delivery of other dangerous products that have been traditionally regulated under states' police powers, including . . . liquor"). Moreover, the questions presented are whether the FAAAA preempts state police powers to regulate "carriers that deliver contraband *such as* tobacco *and other* dangerous substances" and whether it preempts specific state requirements imposed on "shippers of contraband *such as* tobacco *and other* dangerous substances." Pet. i (Questions Presented Nos. 1 and 2) (emphases added).

To be sure, the Court's decision in this case interpreting the preemptive scope of the FAAAA will have implications for other state laws beyond the particular Maine tobacco law at issue. Nevertheless, it is important for the Court to recognize that state laws that govern alcohol distribution stand in a unique position and present unique legal issues because the Twenty-first Amendment grants the States plenary authority to regulate the distribution and transportation of alcohol within their borders. Because alcohol is singled out in the Constitution – alone among commodities – as a product over which States have unparalleled authority, this Court has held that ordinary principles of federalism do not apply in cases addressing the appropriate federal-state balance in the area of alcohol regulation. Thus, whatever standards of preemption arise under the FAAAA that apply to the transportation of other products do not necessarily control when the product is alcohol. Therefore, the Court should make clear in its decision that it is not addressing or resolving any issues concerning federal preemption of state laws that govern the shipment and delivery of alcohol.

Section 2 of the Twenty-first Amendment provides:

> The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

The Court has held that the Twenty-first Amendment "grants the States virtually complete control over whether to permit importation or sale of liquor and how to structure the liquor distribution system." *California Retail Liquor Dealers Ass'n* v. *Midcal Aluminum, Inc.*, 445 U.S. 97, 110 (1980). The Court recently reaffirmed its adherence to this language in *Granholm*, 544 U.S. at 488, and further held that "[t]he aim of the Twenty-first Amendment was to allow States to maintain an effective and uniform system for controlling liquor by regulating its transportation, importation, and use." *Id.* at 484; see also *id.* at 494 ("our Constitution has placed commerce in alcoholic beverages in a special category") (Stevens, J., dissenting). As this Court has recognized, state alcohol distribution systems adopted pursuant to the Twenty-first Amendment serve vital state interests in "promoting temperance, ensuring orderly market conditions, and raising revenue." *North Dakota*, 495 U.S. at 432. Accordingly, "[g]iven the special protection afforded to state liquor control policies by the Twenty-first Amendment, they are supported by a strong presumption of validity and should not be set aside lightly." *Id.* at 433. Thus, the ordinary respect accorded to state regulation is given special weight when the subject at issue is alcohol transportation and distribution.

It is therefore not surprising that the Court has held that § 2 of the Twenty-first Amendment necessarily constrains Congress' power to regulate the distribution and transportation of alcohol in ways that might interfere with comprehensive state schemes. Specifically, the Court has held that although "§ 2 does not abrogate Congress' Commerce Clause powers with regard to liquor," *Granholm*, 544 U.S. at 487, Congress' interstate commerce power "is directly qualified by § 2." *Midcal*, 445 U.S. at 108; see also *324 Liquor Corp.* v. *Duffy*, 479 U.S. 335, 346 (1987) ("§ 2 directly qualifies the federal commerce power").

As a result, resolution of questions concerning the proper boundaries and balance between federal and state regulation

of alcohol requires consideration of both the Commerce Clause and the Twenty-first Amendment, in light of the facts and regulations at issue in the particular case:

> Both the Twenty-first Amendment and the Commerce Clause are parts of the same Constitution. Like other provisions of the Constitution, each must be considered in the light of the other, *and in the context of the issues and interests at stake in any concrete case.*

Hostetter v. *Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324, 332 (1964) (emphasis added). Ultimately, the Court resolves issues concerning the proper federal-state balance in the area of alcohol regulation by engaging in a "pragmatic effort to harmonize state and federal powers." *Midcal*, 445 U.S. at 109; see also *id.* at 110 ("The competing state and federal interests can be reconciled only after careful scrutiny of those concerns in a 'concrete case.'") (quoting *Hostetter*, 377 U.S. at 332).

In the specific context of federal preemption, the Court has held that the necessary "harmonization" of federal power under the Commerce Clause and state power under the Twenty-first Amendment requires express consideration and analysis of the State's interests under the Twenty-first Amendment. In *Capital Cities Cable, Inc.* v. *Crisp*, 467 U.S. 691 (1984), the Court addressed whether provisions of federal communications law preempted Oklahoma's requirement that Oklahoma cable television operators delete advertisements for alcoholic beverages contained in the out-of-state signals that they retransmitted to their subscribers. The Court engaged in a two-step analysis to resolve the preemption issue. First, it "consider[ed] whether the Oklahoma statute does in fact conflict with federal law." *Id.* at 698. After concluding that a conflict existed, it then "assess[ed] the impact of the Twenty-first Amendment." *Id.* (noting that the Court employed a similar two-step analysis in *Midcal*, where it concluded that a California wine-pricing program violated the Sherman Act and then addressed whether the Twenty-first Amendment

nevertheless barred application of the Sherman Act in the particular case); see also *id.* at 712 (the Court must "consider whether § 2 permits Oklahoma to override the federal policy").

In conducting the second step of the analysis in *Crisp* – the Twenty-first Amendment analysis – the Court said that the "central question" is

> whether the interests implicated by a state regulation are so closely related to the powers reserved by the Twenty-first Amendment that the regulation may prevail, notwithstanding that its requirements directly conflict with express federal policies.

Id. at 714 (citing *Midcal* and *Hostetter* for the proposition that this "central question" must be resolved "within the context of the issues and interests at stake in each case"). It noted that the force of the Twenty-first Amendment is greatest when the state regulation at issue "directly implicate[s]" the State's "*central power under the Twenty-first Amendment of regulating the times, places, and manner under which liquor may be imported and sold.*" *Id.* at 716 (emphasis added). After examining the purposes, operation and effects of the state law in *Crisp*, the Court concluded that Oklahoma's advertising provision "only indirectly" implicated that central power and, therefore, held that enforcement of the provision was barred by the Supremacy Clause. *Id.* at 715; see also *324 Liquor Corp.*, 479 U.S. at 346-52 (concluding that the Twenty-first Amendment did not bar application of the Sherman Act to New York's statutory scheme governing liquor prices, where the State failed to establish that the scheme furthered its stated interests in stabilizing the retail market by protecting small retailers or in promoting temperance).

The foregoing precedent establishes that federal preemption questions involving state laws that regulate the distribution and transportation of alcohol present unique and complex

Twenty-first Amendment issues that require unique and fact-intensive analysis. Specifically, even if a court determines that there is a conflict between the federal and state laws, it must then go further and examine the state interests that are "implicated by [the] state regulation" and determine whether those interests "are so closely related to the powers reserved by the Twenty-first Amendment" that they must prevail over the countervailing federal interests. *Crisp*, 467 U.S. at 714. Accordingly, however the Court decides the FAAAA preemption issue in this case with respect to Maine's tobacco law, and however that ruling might apply to other state laws that address the shipment and delivery of other products which may be subject to abuse by minors, the Court should be mindful that laws that address alcohol products stand apart from these other laws and require a separate Twenty-first Amendment analysis. This concern is paramount in a case, such as this one, that involves the transportation of products into the hands of consumers, an area where the States' powers under the Twenty-first Amendment are at their zenith. Therefore, the Court should not address in this case any issue concerning federal preemption of state laws governing the shipment and delivery of alcohol products and should make clear in its decision that such state laws are not encompassed by its ruling.

CONCLUSION

The Court should not decide in this case any issue concerning federal preemption of state laws governing the shipment and delivery of alcohol.

Respectfully submitted,

CRAIG WOLF
JOANNE MOAK
KENT G. HUNTINGTON
WINE AND SPIRITS
WHOLESALERS OF
AMERICA, INC.
805 Fifteenth Street, N.W.
Suite 430
Washington, D.C. 20005
(202) 371-9792

CARTER G. PHILLIPS*
JACQUELINE G. COOPER
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

STEVEN A. ELLIS
SIDLEY AUSTIN LLP
555 West Fifth Street
Los Angeles, CA 90013
(213) 896-6000

Counsel for Amicus Curiae Wine and Spirits Wholesalers of America, Inc.

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*Counsel of Record